Supreme Court, U.S.
FILED

(1)

No. 00- 001700 MAY 14 2001

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IN THE

Supreme Court of the United States

U-HAUL INTERNATIONAL, INC., ET AL.,

Petitioners,

v.

KAREN ROMANO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 14, 2001

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the "integrated enterprise" test may be used to charge a parent corporation with vicarious liability under Title VII for the employment decisions of its subsidiary where it is undisputed that the parent played no role in the employment decisions affecting the employee, and there were no circumstances for piercing the corporate veil.

2. Whether punitive damages may be automatically imputed to a parent corporation by application of the integrated enterprise test, without a finding of any wrongdoing by the parent, and without any separate analysis of the parent's consciousness of wrongdoing or good faith efforts to comply with Title VII.

3. Whether punitive damages are available under Title VII in the absence of compensatory damages.

4. Whether nominal damages are available under Title VII.

5. Whether the question of a parent corporation's status as an "employer" under Title VII is a threshold issue of subject matter jurisdiction not subject to waiver.

RULE 29.1 STATEMENT

The petitioners are U-Haul International, Inc. and U-Haul Co. of Maine, Inc., defendants-appellants below. U-Haul Co. of Maine, Inc. is a wholly owned subsidiary of U-Haul International, Inc., which is a wholly owned subsidiary of AMERCO, a publicly traded company.

The respondent is Karen Romano, a resident of the State of Maine, who was plaintiff-appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, U-Haul International, Inc. and U-Haul Co. of Maine, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered December 7, 2000.

OPINIONS BELOW

The First Circuit opinion is reported at 233 F.3d 655 (1st Cir. 2000) and annexed hereto as Appendix A (A. 1a). The opinion and judgments of the District Court for the District of Maine are not officially reported and are annexed hereto as Appendix B (A. 37a). The order of the First Circuit denying petitioners' request for rehearing and rehearing en banc is annexed hereto as Appendix C (A. 45a).

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on December 7, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and rehearing en banc on February 13, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PROVISIONS AT ISSUE

This case involves the following federal statutes, the pertinent provisions of which are annexed hereto as Appendix D (A. 47a):

1. 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964.

2. 42 U.S.C. § 1981a, the Civil Rights Act of 1991.

STATEMENT OF THE CASE

Karen Romano ("Romano") was hired by the local manager of the Waterville, Maine U-Haul Center and began work on May 1, 1996, as a customer sales representative. The Waterville Center is part of U-Haul Co. of Maine, Inc. ("U-Haul Maine"), which, in turn, is a wholly owned subsidiary of U-Haul International, Inc. ("UHI").

Just two weeks later, on May 14 or 15, Romano's employment was terminated by the same manager who had hired her. Romano claimed her termination was impermissibly based on her gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the Maine Human Rights Act, 5 Me. Rev. Stat. Ann. § 4613. It was undisputed that all employment decisions as to Romano were made by U-Haul Maine personnel and that no UHI employee had any involvement at all in those employment decisions.

Romano sued both U-Haul Maine and its parent UHI. UHI answered by stating it was not Romano's employer and subsequently moved for summary judgment on that ground. One of the legal arguments raised by UHI was that it could not be considered Romano's employer under agency principles. The District Court denied the

summary judgment motion, ruling that it would apply some variant of the "single employer" or "integrated enterprise" test.

At the outset of the trial, the District Court again ruled it would apply some variant of the four-factor integrated enterprise test. The action was tried before a jury over the course of three days, on June 23, 24 and 28, 1999. The opinion of this Court in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), was issued June 22, 1999. On June 29, 1999, the jury returned an initial verdict for Romano, awarding $0 in compensatory damages, $15,000 in nominal damages, and $625,000 in punitive damages against both UHI and its subsidiary U-Haul Maine. The District Court decided, incorrectly, that the jury's award of $15,000 in nominal damages was inconsistent with its award of $0 in compensatory damages. Over petitioners' objections, the District Court resubmitted to the jury the two Special Interrogatories on compensatory and nominal damages, instructing the jury that its verdict showed "confusion" between the two questions. After further deliberation, the jury returned with a verdict of $15,000 compensatory damages and no nominal damages.

On July 15, 1999, the District Court entered judgment for Romano, awarding $15,000 in compensatory damages and $285,000 in punitive damages, in conformity with Title VII damages caps. *See* 42 U.S.C. § 1981a(b)(3). On July 28, 1999, petitioners moved for judgment as a matter of law, a new trial and, in the alternative, remittitur. The District Court denied the post-trial motions on October 28, 1999,

stating that in their post-trial motions petitioners "restate legal and factual arguments made in the Motion for Summary Judgment and at trial." (A. 37a-38a). Amended judgment was entered on October 29, 1999.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE APPLICATION OF THE INTEGRATED ENTERPRISE TEST IN TITLE VII CASES DIRECTLY CONFLICTS WITH TWO SEPARATE LINES OF SUPREME COURT JURISPRUDENCE.

A. SUPREME COURT PRECEDENT MANDATES CONSTRUCTION OF TITLE VII UNDER COMMON LAW AGENCY PRINCIPLES.

Whether a parent corporation is an "employer" of its subsidiary's employees for Title VII purposes must be determined by common law agency principles and common sense dictionary definitions—and not by application of some judicially created artificial construct such as the "integrated enterprise" test. The "integrated enterprise" test is a legal fiction created by the judiciary for use in NLRA cases. *See Radio & Television Broad. Technicians Local Union* v. *Broad. Serv. of Mobile, Inc.*, 380 U.S. 255 (1965) (per curiam). It is no part of the common law of agency and must be rejected under the principles so repeatedly and clearly enunciated by the Supreme Court.

As early as 1986, this Court held that common law agency principles should be applied in Title VII cases:

> *Congress wanted courts to look at agency principles for guidance in this area.* While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

Meritor Sav. Bank v. *Vinson*, 477 U.S. 57, 72 (1986), *citing* Restatement (Second) of Agency §§ 219-237 (1958) (emphasis added).

When this Court next construed employment relationships under Title VII, it again declared that common law agency principles should govern:

> *In express terms, Congress has directed federal courts to interpret Title VII based on agency principles.* We rely "on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms." *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 740 (1989).

Burlington Indus., Inc. v. *Ellerth*, 524 U.S. 742, 754-55 (1998) (emphasis added). *Accord*

Faragher v. *City of Boca Raton*, 524 U.S. 775, 791-92 (1998) ("the very definition of employer in Title VII, as including an 'agent', . . . expressed Congress's intent that courts look to traditional principles of the law of agency").

Most recently, in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), this Court relied on *Meritor*, *Ellerth*, and *Faragher* to hold that common law agency principles must also be applied in analyzing the availability of punitive damages under Title VII. *Id.* at 541-42.

Common law agency principles were expressly applied to the definition of "employer" and "employee" in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318, 319 (1992) (the term "employee" should be construed to determine when an employee/employer relationship exists in the ERISA context under "*traditional agency law criteria* for identifying master-servant relationships") (emphasis added). It must be assumed that Congress used the terms "employee" and "employer" in accordance with their "settled meaning . . . under the common law." *Id.* at 322, *quoting Reid*, 490 U.S. at 739-40 ("In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."). Thus, in *Reid*, this Court interpreted "employee"

under the Copyright Act in accordance with agency principles.[1/]

Significantly, in *Darden*, this Court noted that because the definition of "employee" under the NLRA differed from and was broader than that in ERISA (which is like that of Title VII), the various tests established by case law under the NLRA were inapplicable. *See id.* at 325. The Supreme Court thus instructed that artificial tests created under the NLRA to judge employer-employee status should be rejected in favor of common law agency principles. Because the definitions of "employer" and "employee" under ERISA, Title VII and the ADEA are virtually identical, *Darden's* holding applies with equal force to Title VII cases. *See, e.g., Dominiguez-Cruz* v. *Suttle Caribe, Inc.*, 202 F.3d 424, 428 n.2 (1st Cir. 2000) (Title VII, ADEA and ERISA stand *in pari passu* and judicial precedents interpreting one statute are instructive in interpreting another); *Duckworth* v. *Pratt & Whitney, Inc.*, 152 F.3d 1, 6 (1st Cir. 1998) (same).

This Court has also held that other words in Title VII should be given their common "straightforward" meaning: "In the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporaneous common meaning." *Walters* v. *Metro. Educ.*

[1/]The courts of Maine also apply the common law agency principles of the Restatement (Second) of Agency (1958) to define employment relationships. *See, e.g., McLain* v. *Training & Dev. Corp.*, 572 A.2d 494 (Me. 1990).

Enters., 519 U.S. 202, 207 (1997) (interpreting the word "has" in Title VII).

Further support emerges from the legislative history of Title VII. When asked to define "employer" as used in the statute, Sen. Clark responded: "The term "employer" is intended to have its common dictionary meaning, except as expressly qualified by the act." 110 Cong. Rec. 7216 (April 8, 1964) (statement of Sen. Clark). The common dictionary meaning of employer is "[a] person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages. Cf. PRINCIPAL." Black's Law Dictionary 544 (7th ed. 1999). *See also* Gerald Hill and Kathleen Hill, *The Real Life Dictionary of the Law*, http://dictionary.law.com, accessed on May 9, 2001 ("a person or entity which hires the services of another called a principal in the law of agency").[2/] No common law, common sense, or common dictionary meaning of "employer" incorporates a creature such as the four-factor "integrated enterprise" test. Accordingly, Title VII must be construed in light of common law agency principles. *See Papa* v. *Katy Indus., Inc.*, 166 F.3d 937 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999).

[2/] "The elements of common-law agency are present in the relationships between employee and employer. . . ." Restatement (Third) of Agency §1.01, comment c, at 21 (Tentative Draft No. 2, March 14, 2001).

One cannot logically apply a common law agency test to define "employee" and then apply some other test to define "employer." The definitions in the statute are, in essence, mirror images of each other, "completely circular" as the *Darden* Court held. 503 U.S. at 323. *Compare* 42 U.S.C. § 2000(e)(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . ;") *with* 42 U.S.C. § 2000(e)(f) ("The term 'employee means an individual employed by an employer . . . ."). Simultaneous application of an artificial construct such as the "integrated enterprise" test to the term "employer" and a common law agency test to define "employee" produces inconsistent and absurd results. Here, for example, under application of common law agency principles, Romano could *not* be considered an "employee" of UHI. It is absurd to suggest that while Romano is not its employee, UHI is nonetheless her "employer."

The First Circuit rejected the agency test in favor of the "integrated enterprise" test. This was error, and certiorari should be granted.

B. SUPREME COURT PRECEDENT FORBIDS DISPLACEMENT OF STATE LAW OF CORPORATIONS.

To extend the reach of Title VII upward to parent corporations by means of an artificial judicial construct violates not only the established rules of agency but also impermissibly interferes with matters of state law contrary to the precepts established in *Erie R. Co.*

v. *Tompkins*, 304 U.S. 64 (1938) (there is "no federal general common law"). In the absence of express Congressional authorization, federal courts simply have no power to create federal common law. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988); *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981); *Northwest Airlines, Inc.* v. *Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77 (1981). Title VII contains neither express nor implied authorization for federal courts to depart from common law principles of both agency and the law of corporations in order to apply some judicially created test in derogation of well established common law principles.[3/]

A long line of Supreme Court cases has repeatedly upheld the limited scope of the potential liability of parent corporations for the acts of their subsidiaries. "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent

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[3/]Common law concepts of limited liability and corporate form are traditionally matters of state law. *See, e.g., J.F. McKinney & Assocs., Ltd.* v. *Gen. Elec. Inv. Corp.*, 183 F.3d 619, 621 (7th Cir. 1999) (whether corporate forms may be disregarded is a matter of state law); *Longhi* v. *Animal & Plant Health Inspection Serv.*, 165 F.3d 1057, 1061 (6th Cir. 1999) ("person" will be interpreted under the federal Animal Welfare Act in accord with traditional corporate law concepts, and not under some judicially created standard, because piercing the corporate veil is a matter of state law); *Stoebner* v. *Lingenfelter*, 115 F.3d 576, 579 (8th Cir. 1997) (piercing the corporate veil is a question to be determined by state law and not by a judicially created standard under the bankruptcy laws).

corporation . . . is not liable for the acts of its subsidiaries." *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998), *quoting* Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929) (holding that CERCLA, 42 U.S.C. § 601 *et seq.*, does not displace state law of corporations and that parent corporations can be liable for acts of subsidiaries only under corporate veil piercing standards or upon active wrongdoing by the parent itself). *See also Burnet* v. *Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities.").

There is nothing in Title VII to indicate "'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based on a federal statute.'" *Bestfoods*, 524 U.S. at 63, *quoting Burks* v. *Lasker*, 441 U.S. 471, 478 (1979). Thus, a parent corporation can be held liable for the acts of its subsidiaries under two scenarios: (1) where the parent has participated in, controlled, or otherwise actively taken part in the wrongful act giving rise to liability (i.e., under common law agency principles) or (2) where the relationship between parent and subsidiary is such that the corporate veil may be pierced under state common law principles. *See Bestfoods*, 524 U.S. at 62-65. The first type of liability is direct; the second, derivative. *Id.*

In the Title VII context, then, direct liability for the parent's own actions (i.e., actual participation in the employment decision claimed to violate Title VII) must be kept distinct from derivative liability under veil piercing standards.

See Bestfoods, 524 U.S. at 67. The integrated enterprise test is an unfortunate amalgam of both derivative and direct principles: it focuses on the relationship between the two corporations (an issue going to indirect liability) instead of focusing on the parent's involvement with the subsidiary's alleged discriminatory actions (the source of any direct liability). *Id.* at 67. As a consequence, it incorrectly treats Title VII "as though it displaced or fundamentally altered common law standards of limited liability," *id.* at 70, and must therefore be rejected. Certiorari should be granted.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

A. THERE IS A SPLIT AMONG THE CIRCUITS AS TO THE PROPER TEST TO DETERMINE PARENT LIABILITY UNDER TITLE VII.

The First Circuit acknowledged there is a split among the circuits in the standard adopted to determine "employer" status under Title VII, *Romano*, 233 F.3d at 664–65, and that there is a further split among the circuits adopting the integrated enterprise test in defining and emphasizing the four factors of that test. *Id.* at 666. The following demonstrates the scattered approach presently being applied in the lower courts.

1st Circuit Adopts integrated enterprise test, but does not look to day-to-day control or parent's actual participation in the discriminatory act. *Romano*, 233 F.3d at 666.

2d Circuit Adopts integrated enterprise test, and requires that the parent actively participate in the discriminatory act. *Cook* v. *Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240-41 (2d Cir. 1995).

3d Circuit Suggests that courts should determine whether to "pierce the corporate veil," *Marzano* v. *Computer Sci. Corp., Inc.*, 91 F.3d 497, 513-14 (3d Cir. 1996), or perform a functional analysis of the relationship between parent and employee, *Graves* v. *Lowery*, 117 F.3d 723, 727-29 (3d Cir. 1997).

4th Circuit Holds that a parent corporation "is the employer of a subsidiary's personnel only if it controls the subsidiary's employment decisions or so completely dominates the subsidiary that the two corporations are the same entity." *Johnson* v. *Flowers Indus., Inc.*, 814 F.2d 978, 980-81 (4th Cir. 1987).

5th Circuit Adopts integrated enterprise test, focuses on centralized control of labor relations and requires that the parent actively participate in the discriminatory act. *Skidmore* v. *Precision Printing & Packaging, Inc.*, 188 F.3d 606, 616-17 (5th Cir. 1999).

6th Circuit Adopts integrated enterprise test, but notes that "[a]ll four criteria need not be present in all cases." *Armbruster* v. *Quinn*, 711 F.2d 1332, 1338 (6th Cir. 1983).

7th Circuit Applies common law agency and veil-piercing principles and expressly rejects integrated enterprise test. *Papa* v. *Katy Indus., Inc.*, 166 F.3d 937, 940-41 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999).

8th Circuit Adopts integrated enterprise test with no apparent emphasis on any particular factor. *Williams* v. *Evangelical Ret. Homes of Greater St. Louis*, 594 F.2d 701, 703 & n.2 (8th Cir. 1979).

9th Circuit Adopts both integrated enterprise test and/or "traditional indicia of an agency relationship." *Childs* v. *Local 18, I.B.E.W.*, 719 F.2d 1379, 1382-83 (9th Cir. 1983). *See also Laughton* v. *Int'l Alliance of Theatrical Stage Employees, etc.*, No. 99-15812, 2001 U.S. App. Lexis 7887, at *7-9 (9th Cir. April 30, 2001).

10th Circuit Identifies three tests: (1) common law agency; (2) the "hybrid" common law economic realities test; and (3) the integrated enterprise test. *Lockard* v. *Pizza Hut, Inc.*, 162 F.3d 1062, 1069-70 (10th Cir. 1998).

11th Circuit Identifies three tests: (1) the integrated enterprise test; (2) the "joint employer" test; and (3) an agency approach. *Lyes* v. *City of Riviera Beach, Fla.*, 166 F.3d 1332, 1341 (11th Cir. 1999).

D.C. Circuit Indicates that integrated enterprise test would be applied to employment discrimination actions. *EEOC* v. *St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 625-26 (D.C. Cir. 1997).

In short, nearly every circuit applies a different standard, resulting in a crazy quilt patchwork of tests.[4/]

B. THIS IMPORTANT QUESTION OF FEDERAL LAW SHOULD BE SETTLED BY THE SUPREME COURT.

Principles of *stare decisis* are the bedrock of our judicial system. With rare exception the lower federal courts have apparently failed to realize that this Court's decisions in *Meritor, Ellerth, Faragher, Kolstad* and *Bestfoods* are in direct conflict with application of the integrated enterprise test in Title VII cases. Certiorari should be granted to ensure that the prior

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[4/]Other surveys of the wide variety of single employer tests are found at Mark Crandley, *The Failure of the Integrated Enterprise Test: Why Courts Need to Find New Answers to the Multiple-Employer Puzzle in Federal Discrimination Cases*, 75 Ind. L.J. 1041 (Summer 2000), and Shauna Wagner, *Annotation: Propriety of Treating Separate Entities As One For Purposes of Determining Number of Employees Required by Title VII of Civil Rights Acts of 1964 (42 U.S.C.A. § 2000e(b)) for Action Against Employer*, 160 A.L.R. Fed. 441 (2000).

decisions of this Court are given precedental effect.

Application of the integrated enterprise test to impute liability to a parent corporation for the acts of its subsidiaries vitiates state law of corporations and thus seriously implicates *Erie*. Certiorari should be granted to ensure that the lower federal courts in Title VII cases do not neglect to respect our deeply rooted notions of federalism.

The lower federal courts have ignored the plain meaning of the word "employer" and expanded the reach of Title VII well beyond that intended by Congress. Certiorari should be granted to ensure that Congressional intent is respected.

Extension of Title VII liability to parents through rote application of the integrated enterprise test defeats the prophylactic purposes of the statute. It leads parent corporations to abdicate all responsibility and contact with subsidiaries as to the federal discrimination laws, in order to avoid the possibility that involvement will result in liability for acts over which they have no practical control. Title VII is better served by encouraging parent corporations to issue broad guidelines and general statements of policies to their subsidiaries to comply with the anti-discrimination laws, without fear of thereby being found to be an integrated enterprise. Change comes from the top down, and the examples and goals set by the parent will foster compliance by its subsidiaries. There can be no doubt that broad pronouncements and

admonitions by the CEO of General Motors about the importance of federal anti-discrimination laws carry more weight than enunciation of the very same principles by the plant manager of the GM plant in Peoria.

The general involvement of parent corporations is desirable as well for the "ripple effect" it has on other companies. For better or worse, large conglomerates are important and highly visible role models. If the CEO of the parent of a major group of affiliated companies speaks about the importance of the anti-discrimination laws, it will encourage other, smaller companies to view these statutes similarly.

Application of the integrated enterprise test may well prompt parent corporations to move their operations off-shore, out of the reach of Title VII, *see EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991),[5/] and thereby adversely affect commerce generally, decrease state and local tax revenues, result in higher unemployment in the United States, and lead to other undesirable economic effects.

Certiorari should be granted to establish uniformity among the circuits on this important issue of federal law. The circumstances under which a subsidiary's Title VII liability may be

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[5/]This case has been superseded by statute on other grounds, as stated in, e.g., *Stender* v. *Lucky Stores, Inc.*, 780 F. Supp. 1302, 1304 (N.D. Cal. 1992).

imputed to its parent should not depend on the circuit in which the suit is brought. Parent and subsidiaries may reside in or be sued in different circuits, and the subsidiary itself may have different facilities in different circuits. Parent corporations need definite guidelines and uniform standards so they may appropriately structure their business operations. The use of different standards in each circuit will inevitably result in forum shopping and unequal treatment of both Title VII plaintiffs and defendant parent corporations.

A decision on this important issue by this Court will promote judicial economy and conserve judicial resources. The decisions of the lower federal courts are confusing, conflicting, and often internally inconsistent.[6/] Clarification by this Court of the principles of parent liability in the Title VII context will dramatically decrease the use of the integrated enterprise test to evade Title VII jurisdictional requirements and caps on damages;[7/] will permit parent corporations that are plainly not employers to obtain dismissal or summary judgment at an early stage of the case

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[6/]Here, for example, the First Circuit held that the "interrelated operations" prong must focus on day-to-day operations but did not require day-to-day control under the "employment relations" prong.

[7/]*See, e.g., Romano*, 233 F.3d 655 (only reason to add parent was to evade damages caps); *Caudle* v. *Bristow Optical Co.*, 224 F.3d 1014 (9th Cir. 2000) (plaintiff moved to add parent as a defendant after the verdict in order to evade damages caps).

rather than engage in needless discovery regarding integrated operations; will result in plainer jury instructions[8/] and thus reduce the chance of error; and cumulatively will result in fewer appeals.

Many if not most Title VII cases also involve a claim under the state law anti-discrimination analogue. Generally speaking, states appear to apply common law, common sense principles of agency law to define "employer" for purposes of determining vicarious liability. *See* John F. Buckley and Ronald M. Green, 1999 State by State Guide to Human Resources Law § 2.3, 2-13 (1999). States do not use the integrated enterprise or other artificial construct to ignore the principles of corporate limited liability. Application of one definition of "employer" for the Title VII claim and another definition of "employer" for the state law claim will inevitably

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[8/]For example, at least one federal district court has stated that control of labor relations is the *critical* factor to finding an integrated enterprise while at the same time stating that control of labor relations is not a *necessary* factor. *Meng* v. *Ipanema Shoe Corp.*, 73 F. Supp. 2d 392 (S.D.N.Y. 1999). In instructing the jury in this case, the District Court merely listed the four factors without any explanation of what they meant. How is a jury to understand "interrelation of operations" when federal courts differ over what it means? *Compare Knowlton* v. *Teltrust Phones, Inc.*, 189 F.3d 1177, 1184 n.7 (10th Cir. 1999) (operations focuses on shared books and records, shared office space, i.e., issues of corporate form and governance), *with Romano*, 233 F.3d at 655 (advertising, sales and marketing are elements of operations, i.e., issues related to business operations).

result in jury confusion and may lead to conflicting and possibly absurd results.

This issue is significant and affects virtually all major United States corporations. "In 1995, the ten largest companies on the Fortune 500 owned an average of 62 subsidiaries each. Many subsidiary corporations, though owned entirely by another corporation, are themselves gigantic corporate enterprises." Eric J. Gouvin, *Resolving the Subsidiary Director's Dilemma*, 47 Hastings L.J. 287 (January 1996). As mergers and consolidations continue, the issue will become even more important.[9/] The magnitude of the issue is increased exponentially by the lower courts' application of the Title VII "integrated enterprise" test to the numerous other federal anti-discrimination statutes[10/] as well as in other labor relations contexts.[11/]

[9/]In 1982, each of the 1,000 largest United States industrial corporations on average controlled 48 subsidiaries. Phillip I. Blumberg, *The Law of Corporate Groups: Substantive Law* xxxiii (1987); Phillip I. Blumberg, *The Law of Corporate Groups: Procedural Law* 463-74 (1983). Thus, the trend is toward larger numbers of subsidiaries.

[10/]The integrated enterprise test has been applied to claims under the ADA, *EEOC* v. *St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 625 (D.C. Cir. 1997), the ADEA, *Johnson* v. *Flowers Indus., Inc.*, 814 F.2d 978, 980-82 (4th Cir. 1987), and the FMLA, *Douglas* v. *E.G. Baldwin & Assocs., Inc.*, 150 F.3d 604, 606-07, 608 (6th Cir. 1998).

[11/]*See, e.g., Pearson* v. *Component Tech. Corp.*, ___ F.3d ___, 2001 WL 369784 at *10-11, *12-13 (3d Cir. 2001)

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE FIRST CIRCUIT'S DECISION AS TO THE AWARD OF PUNITIVE DAMAGES AGAINST THE PARENT CORPORATION IS DIRECTLY CONTRARY TO SUPREME COURT PRECEDENT AND THE LANGUAGE OF TITLE VII.

A. *KOLSTAD* FORBIDS THE AUTOMATIC IMPUTATION OF PUNITIVE DAMAGES TO A PARENT CORPORATION UNDER THE INTEGRATED ENTERPRISE TEST WHERE THERE WAS NO SHOWING OF ANY CONSCIOUS WRONGDOING BY THE PARENT.

The First Circuit approved the automatic imputation of punitive damages to the parent corporation solely on the basis of the integrated enterprise test, *Romano*, 233 F.3d at 669-70 ("After finding that U-Haul International and U-Haul Company of Maine were a single employer for purposes of Title VII, Smedberg's position as President of U-Haul Company of Maine qualifies him as a manager of U-Haul International as well."), without any finding whatsoever that the subsidiary's manager was also acting as an agent of the parent, and without any separate analysis or finding as to the parent's consciousness of wrongdoing. Significantly, the subsidiary's manager was not an officer or director of the

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(applying integrated enterprise test in action under WARN, 29 U.S.C. § 2101 *et seq.*).

parent corporation. The First Circuit simply held that because the two companies had been found to be a single employer, the manager of the subsidiary was a manager of the parent as well. *Id.*

As this Court enunciated in *Kolstad*, "[t]he common law has long recognized that agency principles limit vicarious liability for punitive awards." 527 U.S. at 541. "Accordingly, 'a positive element of conscious wrongdoing is always required.'" *Id.* at 538, *citing* McCormick, Law of Damages (1935). Vicarious liability for punitive damages cannot be assessed against UHI unless *it*—and not some employee of one of its subsidiaries—committed some conscious wrongdoing. *See Kolstad*, 527 U.S. at 539-42. This is also the law of Maine. *Kopenga* v. *Davric Me. Corp.*, 727 A.2d 906 (Me. 1999) (punitive damages cannot be imposed on one who commits no wrongful act).

The jury was improperly permitted to impute liability for punitive damages to UHI on the basis of pure vicarious liability, without any evidence of conscious wrongdoing—indeed, any action whatsoever—by UHI. This grossly contravened the mandate of *Kolstad*, which requires a separate analysis and finding as to *both* UHI's state of mind and UHI's good faith efforts to comply with Title VII. No such findings were made by the jury, nor did the evidence support such a finding. Yet it remains the case that, in order to obtain punitive damages, Romano must "demonstate[ ] that [UHI] engaged in a discriminatory practice . . . with malice or with reckless indifference" to her federally

protected rights. 42 U.S.C. § 1981a(b)(1). Certiorari should be granted.

B. THIS CASE PRESENTS QUESTIONS OF FIRST IMPRESSION ABOUT THE CIRCUMSTANCES UNDER WHICH PUNITIVE DAMAGES CAN BE AWARDED UNDER 42 U.S.C. § 1981a.

1. PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER TITLE VII IN THE ABSENCE OF ACTUAL INJURY OR COMPENSATORY DAMAGES.

The jury's original verdict awarded plaintiff $0 in compensatory damages (Interrogatory 4), $15,000 in nominal damages (Interrogatory 5), and $625,000 in punitive damages (Interrogatory 6). Despite the lack of any inconsistency in the answers to the special interrogatories, the District Court resubmitted Interrogatories 4 and 5 to the jury, telling them there was confusion in their answers. The jury then changed its verdict. Resubmission in the absence of inconsistency was error, and the jury's original verdict of no compensatory damages must be reinstated.

Once the original verdict is reinstated, no award of punitive damages can be sustained. Punitive damages are not available under 42 U.S.C. § 1981a in the absence of an award of compensatory damages. *See* H.R. Rep. No. 102-40(I) p. 72, *reprinted in* 1991 U.S.C.C.A.N. 610 ("Plaintiffs must first prove intentional

discrimination, then must prove *actual injury or loss* arising therefrom to recover compensatory damages, and must meet an even higher standard to recover punitive damages.") (original emphasis). *See also Quint* v. *A.E. Staley Mfg. Co.*, 172 F.3d 1, 21 n.10 (1st Cir. 1999) (punitive damages recoverable under ADA "as long as some compensatory damages are awarded or the district court awards back pay"); *Provencher* v. *CVS Pharmacy, Div. of Melville Corp.*, 145 F.3d 5 (1st Cir. 1998) (punitive damages available under § 1981a where plaintiff has been awarded either compensatory damages or other actual damages such as back pay).

This raises an important question of first impression, and certiorari should be granted.

2. NOMINAL DAMAGES ARE NOT AVAILABLE UNDER SECTION 1981a.

42 U.S.C. § 1981a speaks only of "compensatory and punitive" damages. Nothing in the statute authorizes an award of nominal damages under Title VII. Only one Circuit has held that punitive damages are available under § 1981a in the absence of actual damages, either compensatory or equitable. *See Timm* v. *Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998). The First Circuit, without published opinion, has affirmed a district court ruling that nominal damages are *not* available under Title VII. *See Afanador* v. *United States Postal Serv.*, 787 F. Supp. 261, 274 (D.P.R. 1991), *aff'd*, 976 F.2d 724 (1st Cir. 1992).

Because this question raises a novel issue concerning an important federal law and because there is a conflict in the circuits, this Court should grant certiorari.

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A THRESHOLD ISSUE OF SUBJECT MATTER JURISDICTION IS PRESENTED BY THE QUESTION OF WHEN A PARENT IS AN "EMPLOYER" OF ITS SUBSIDIARY'S EMPLOYEES FOR TITLE VII PURPOSES.

The First Circuit held that petitioners had waived their arguments against application of the integrated enterprise test because they did not fully articulate the alternative common law agency standard they proposed be used in its stead. The First Circuit's waiver decision was erroneous for numerous reasons not pertinent for certiorari purposes.[12/]

[12/]First, the First Circuit erred as a factual matter when it stated that petitioners had not raised the agency argument at any time in the proceedings below. In fact, the agency issue was briefed extensively by petitioners in their summary judgment motion. The District Court denied the summary judgment motion, ruling that it would apply some variant of the integrated enterprise test. Petitioners renewed their agency arguments in their post-trial motions, and the District Court's order denying those motions expressly acknowledged that petitioners had "restate[d] legal and factual arguments made in their Motion for

Assuming *arguendo* that petitioners waived that argument at the District Court level, the waiver was immaterial to the appeal before the First Circuit. Because the "employer" question is an issue of subject matter jurisdiction, it was not subject to waiver and should have been addressed by the First Circuit.

The circuits are divided on the general question whether defendant's status as a putative Title VII "employer" presents an issue of subject matter jurisdiction or whether determination of a

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Summary Judgment" and denied the post-trial motions on the same grounds.

Second, *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), applies because the District Court *twice* relied on petitioners' agency argument and twice rejected it. The First Circuit conceded that petitioners repeatedly and consistently argued that the parent UHI was not plaintiff's employer *Romano*, 233 F.3d at 662, and that petitioners objected to the jury instructions because the parent corporation was not a final decision maker in connection with the employment at issue. *Id.* at 663.

Third, the First Circuit erred in concluding that the District Court's application of the integrated enterprise test in this case was not plain error. *See* discussion in Section I above. *See also City of Newport*, 453 U.S. at 256-57.

Fourth, the First Circuit erroneously held that petitioners' rights were not saved by their repeated objections that the parent was not plaintiff's employer. Once petitioners raised an objection to subject matter jurisdiction, it was not *their* burden to show the absence of jurisdiction but, rather, *plaintiff's* burden to show jurisdiction existed.

defendant's status is merely an element of plaintiff's prima facie case.

One group of lower federal courts holds that satisfaction of the "employer" definition is a jurisdictional prerequisite to Title VII claims, and routinely affirms dismissal for lack of subject matter jurisdiction. [13/] A second group of lower courts holds that the status of a defendant as plaintiff's "employer" is both a jurisdictional issue and an element of the Title VII claim on the merits.[14/] This Court has referred in dicta to the

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[13/]Fourth Circuit: *Woodward* v. *Va. Bd. of Bar Exam'rs*, 598 F.2d 1345, 1346 (4th Cir. 1979). *See also Hukill* v. *Auto. Care, Inc.*, 192 F.3d 437 (4th Cir. 1999), *cert. denied*, 529 U.S. 1116 (2000) (analogous FMLA claim).

Sixth Circuit: *Armbruster* v. *Quinn*, 711 F.2d 1332, 1335 (6th Cir. 1983). *See also Douglas* v. *E.G. Baldwin & Assocs., Inc.*, 150 F.3d 604, 606-07, 608 (6th Cir. 1998) (FMLA case).

Ninth Circuit: *Herman* v. *United Bhd. Of Carpenters & Joiners of Am., Local No. 971*, 60 F.3d 1375, 1385 (9th Cir. 1995); *Childs* v. *Local 18, Int'l Bhd. Of Elec. Workers*, 719 F.2d 1379 (9th Cir. 1983).

Eleventh Circuit: *Lyes* v. *City of Riviera Beach*, 166 F.3d 1332, 1340 (11th Cir. 1999) ("threshold jurisdiction matter"); *Scarfo* v. *Ginsberg*, 175 F.3d 957, 961 (11th Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000); *Virgo* v. *Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994).

[14/]Second Circuit: *DaSilva* v. *Kinsho Int'l Corp.*, 229 F.3d 358, 365 (2d Cir. 2000).

terms "employer" and "commerce" as "jurisdictional provisions." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991). In *Walters* v. *Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997), this Court reviewed the dismissal of a Title VII action for lack of subject matter jurisdiction because the employer did not pass the 15-employee threshold, and did not criticize the propriety of the District Court's treatment of the issue as jurisdictional.

None of the circuits has explicitly addressed the issue whether the same standard should apply when the putative employer is a parent corporation of the direct employer rather than the direct employer itself. Petitioners do not address the more general question whether a jurisdictional issue is presented when the putative defendant is plaintiff's *direct* employer. Petitioners' argument focuses only on attempts to assert jurisdiction over parent corporations as indirect employers.

Fifth Circuit: *Clarke* v. *Tarrant County, Tex.*, 798 F.2d 736, 742 (5th Cir. 1986). *But see Greenlees* v. *Eidenmuller Enter., Inc.*, 32 F.3d 197, 198 (5th Cir. 1994) (jurisdictional only).

Seventh Circuit: *Papa* v. *Katy Indus., Inc.*, 166 F.3d 937, 939-40 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999). *See also Sharpe* v. *Jefferson Distrib. Co.*, 148 F.3d 676, 677-78 (7th Cir. 1998), *abrogated on other grounds* by *Papa* v. *Katy Indus., Inc.*

D.C. Circuit: *EEOC* v. *St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 623-24 (D.C. Cir. 1997).

In the case where the defendant is not plaintiff's direct employer and would not be treated as plaintiff's employer under common law agency principles, the issue should be viewed as jurisdictional in nature. This approach corresponds to the principles enunciated in *Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946) ("a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.").

In this case, the only purpose behind plaintiff's pursuit of UHI was to avoid the damages caps of 42 U.S.C. § 1981a(b)(3). There was no question of jurisdiction over the subsidiary, nor was there any question that the subsidiary would not be able to satisfy any judgment plaintiff received. The only thing plaintiff accomplished by the joinder of the parent was the ability to introduce into evidence the *parent's* financials and to exhort the jury to add a lot of zeros to the verdict to send a message "all the way out in Phoenix, where U-Haul International is headquartered." Trial Tr. at 545, Closing Argument by Plaintiff's Counsel. Joinder of a parent to evade the damages caps of § 1981a is impermissible and unwarranted, and should be treated as similar to fraudulent joinder in diversity actions. There is no subject matter jurisdiction.

Certiorari should be granted on this important issue of first impression because it dovetails with the principles addressed in

Question 1. When a parent corporation is claimed to be the plaintiff's "employer," the parent's status as an "employer" under Title VII should be treated as an issue of subject matter jurisdiction in the absence of a good faith, non-frivolous claim that the parent participated in or controlled the employment decisions of its subsidiary as to the plaintiff, or that corporate veil piercing principles apply.

CONCLUSION

For all the above reasons, this petition for a writ of certiorari to the First Circuit should be granted.

Respectfully submitted,

U-HAUL INTERNATIONAL, INC. AND U-HAUL CO. OF MAINE, INC.,

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Dated: May 14, 2001

APPENDIX

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 99-2328

KAREN ROMANO,

Plaintiff, Appellee,

v.

U-HAUL INTERNATIONAL,

U-HAUL COMPANY OF MAINE, INC.,

Defendants, Appellants.

FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Morton A. Brody, U.S. District Judge]

Before

Torruella, Chief Judge,

Casellas* and Saris,** District Judges.

Elaine McChesney, with whom Patricia J. Hill, Daniel J. Jackson, James M. Hankins and Bingham Dana LLP were on brief, for appellants.

Jeffrey Neil Young, with whom Stephen J. Sucy, and McTeague, Higbee, Case, Cohen, Whitney & Toker, P.A. were on brief, for appellee.

December 7, 2000

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*Of the District of Puerto Rico, sitting by designation.

**Of the District of Massachusetts, sitting by designation.

TORRUELLA, *Chief Judge.* This is an appeal from a jury verdict in the District of Maine finding that appellants U-Haul International and U-Haul Company of Maine unlawfully terminated appellee Karen Romano on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964 and the Maine Human Rights Act. Appellants (for simplicity,[1]/ referenced in this appeal as U-Haul) do not appeal the underlying jury finding of liability. Instead, they oppose the inclusion of U-Haul International in this lawsuit, contending that it cannot properly be considered appellee's "employer" for purposes of Title VII. In addition, U-Haul appeals several issues regarding the imposition of punitive and other damages. We affirm the jury verdict and subsequent action of the district court in all respects.

BACKGROUND

In mid-April of 1996, Greg Nadeau, Manager of the Waterville, Maine U-Haul Center, placed an advertisement in the local paper for a customer service representative. Appellee Karen Romano responded to the advertisement and was told by Nadeau that the job entailed answering phones, renting trucks, and installing trailer hitches. After informing Nadeau that she had customer service experience, had worked with

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[1]/A chief contention in this appeal is whether U-Haul International, U-Haul Company of Maine's parent corporation, is a proper defendant in this lawsuit. Our designation of appellants as "U-Haul" for portions of this opinion is a mere convenience and not intended as a substantive comment on the merits of appellants' claims.

computers, and enjoyed working on cars with her husband (though she had no formal mechanical background), Romano was hired for the position.

Romano began part-time work on May 1, 1996. On her second or third day of work, U-Haul Company of Maine President Paul Smedberg called the Waterville Center. Romano answered the phone. Smedberg seemed quite surprised, inquiring twice whether he had reached U-Haul of Waterville, and then asked to speak with Nadeau. From hearing Nadeau's side of the conversation, Romano discerned that there was a problem with her hiring. After hanging up the phone, Romano testified that Nadeau told her that: "they didn't want women installing hitches, that women are supposed to be working in the main office."

No further training of Romano took place. At the end of her first week, Romano learned that a new employee, Robert Runshe, had been hired. Nadeau reportedly told Romano that he had not hired Runshe; that they "came in over his head." On May 14 or 15, Nadeau called Romano and terminated her employment. According to Romano, Nadeau apologized, claimed no responsibility in the decision but said that it came from higher up. He explained, "The only problem you have is you sit when you pee." Later, Nadeau allegedly repeated that Romano had been fired because of her sex to Romano and her then-husband Nick Romano, to Robert Runshe, and to Romano's father, Roland Daigneault. U-Haul, in contrast, claimed that Romano was fired because she did not have hitch installation experience and there was no time to train her.

Romano filed a complaint against U-Haul on May 18, 1999 charging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Maine Human Rights Act, 5 Me. Rev. Stat. Ann. § 4613. Following a three-day trial, the jury returned a verdict in favor of Romano and awarded $0 in compensatory damages, $15,000 in nominal damages, and $625,000 in punitive damages. The district court, concluding that the verdict reflected confusion over compensatory and nominal damages, resubmitted the special interrogatories relating to these damages. After asking the court whether only $1 may be awarded in nominal damages,[2] the jury returned with a verdict of $15,000 compensatory damages and $0 nominal damages. On July 15, 1999, the district court entered judgment for Romano in the amount of $15,000 compensatory damages and $285,000 punitive damages, adjusting the jury award to conform with Title VII punitive damages caps. By Order and Memorandum of October 28, 1999, the district court denied U-Haul's Motions for Judgment as a Matter of Law, for a New Trial, or, in the alternative, for Remittitur.

Appellant U-Haul appeals the following issues: (1) the submission of a jury instruction on the integrated-enterprise test instead of an "agency" test instruction to determine whether both U-Haul International and U-Haul Company of Maine should be considered Romano's

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[2]The district judge responded that while nominal damages are not limited to $1, the amount must be minimal.

employer[3]/ for purposes of Title VII; (2) the formulation of the integrated-enterprise test for purposes of jury instruction; (3) the determination by the jury that U-Haul International and U-Haul Company of Maine are a single employer for purposes of Title VII; (4) the imposition of punitive damages liability on U-Haul International; (5) the resubmission of Special Interrogatories 4 and 5 on compensatory and nominal damages to the jury; and (6) the amount of punitive damages awarded. Appellee Romano disagrees with the substance of appellants' arguments and claims that appellants have waived most of these arguments for failure to properly assert them prior to this appeal. We will discuss each issue in turn.

DISCUSSION

I. Determination of Employer Status for U-Haul International

A. Throughout pre-trial, trial, and post-trial motions, U-Haul International has consistently argued that it was not Romano's employer. In support, U-Haul International offers that it was not responsible for hiring, supervising, or firing Romano. Those responsibilities fell entirely upon U-Haul Company of Maine and its personnel. As to the relationship between U-Haul International and U-Haul Company of Maine, U-Haul described it, in its Motion for Summary

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[3]/Appellants do not dispute that U-Haul Company of Maine was Romano's employer.

Judgment, as a "complex contractual relationship between two entities." This relationship, from U-Haul International's perspective, is insufficient to render it liable under Title VII for Romano's firing.

U-Haul acknowledges that, under certain circumstances,[4] two entities may be sued as a "single employer" under Title VII. The district court, considering which test to instruct the jury on in determining single-employer status, elected to apply the integrated-enterprise test. The integrated-enterprise test, first developed to determine whether interrelated companies should be treated as one entity under the National Labor Relations Act, 29 U.S.C. § 164, examines four factors: 1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. In pre and post-trial motions, U-Haul argued that either the integrated-enterprise test should be instructed with an emphasis on the labor factor, or, preferably, a joint-enterprise test[5] should be given to the jury.

Appellant U-Haul now appeals the district court's choice of the integrated-enterprise test and argues that common-law agency principles[6]

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[4]/For example, in a parent-subsidiary context.

[5]/A joint-enterprise test, as characterized by appellants, determines whether the two entities, while separate, jointly control the terms and conditions of employment.

[6]/Although entirely unclear in U-Haul's Brief, we assume that by "common-law agency principles" appellants

should have determined the single-employer issue. U-Haul's legal support for application of the "agency" test is allegedly based on the principles articulated by the Supreme Court in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999). According to U-Haul, the *Kolstad* decision mandates application of common-law agency principles in Title VII cases. As such, appellant urges that the district court should have instructed the jury using a test formulated by the Seventh Circuit in *Papa* v. *Katy Industries, Inc.*, 166 F.3d 937 (7th Cir. 1999). U-Haul failed, however, to argue prior to filing the brief in this appeal that agency principles should be followed. Appellant had accordingly never cited *Papa* as the proper standard for instructing the jury. Because we find, as discussed below, that U-Haul has forfeited its agency argument, the district court's use of the integrated-enterprise test instead of appellants' agency test is subject to plain error review. Under this standard, we uphold the decision of the district court to instruct on the integrated-enterprise test for determining single-employer status.

Rule 51 of the Federal Rules of Civil Procedure states, in relevant part: "No party may assign as error the giving or the failure to give an

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mean that U-Haul International cannot be liable as Romano's employer unless it is found that U-Haul Company of Maine was U-Haul International's agent. An agent is characterized as one who is authorized to act on behalf of the principal, subject to the principal's control, and who has consented to act in an agency capacity. *See* Restatement (Third) of Agency § 1.01 (Tentative Draft No. 1, 2000).

instruction *unless that party objects thereto* before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds of the objection.*" Fed. R. Civ. P. 51 (emphasis added). While it is true that: "[f]rom the outset, UHI [U-Haul International] has consistently argued that it cannot be held responsible as Romano's employer as a matter of law," the agency argument presented in U-Haul's brief was not made by U-Haul in its objections to the jury instructions. Throughout the proceedings, U-Haul repeatedly made the argument that either the integrated-enterprise or the joint-enterprise test should apply. No mention at any time was made by U-Haul that agency principles should govern the employer test. U-Haul did submit a jury instruction on agency (Request No. 8), but then failed to raise it at the charge conference or to object to its absence after jury instructions were given. In fact, U-Haul made no reference to its Request No. 8 on the record at any point. U-Haul cannot claim that its agency argument is preserved simply because it generally objected to being characterized as appellee's employer.

U-Haul further argues that they did raise the agency issue by consistently objecting to the identity-of-employer test. They contend that "technical precision" is not necessary, provided that the objections have been made with "sufficient certainty to apprise the court of the movant's position." *Pstragowski* v. *Metropolitan Life Ins. Co.*, 553 F.2d 1, 3 (1st Cir. 1977). And, in oral argument before this Court, appellants asserted that the agency test they now advocate is merely their joint-enterprise test under a different name, thereby preserving the agency argument.

We fail to see how making a joint-enterprise argument equates with the agency test presented in this appeal. The joint-enterprise test does not adopt common law agency principles as the basis for its determination. The objections made by U-Haul to the district court's construction of the integrated-enterprise test and to the failure to give a joint-enterprise instruction are insufficient to preserve the agency issue on appeal.

U-Haul claims that the district court knew about the availability of an agency test, citing brief references to an agency standard in various party motions and at one point in discussions with the district court. An awareness by the parties and the district court that an agency standard could be one way of determining single-employer status is not sufficient to excuse appellants' obligation to object to the jury instructions under Rule 51. The requirement that the grounds for objecting to a jury instruction must be distinctly stated is treated seriously by this Court. *See Scarfo* v. *Cabletron Sys., Inc.*, 54 F.3d 931, 944 (1st Cir. 1995); *Elwood* v. *Pina*, 815 F.2d 173, 175-76 (1st Cir. 1987). We will not excuse appellants' failure to argue for an agency test during jury instruction objections based on a purely speculative claim that the district court had some awareness that an agency instruction could be given.

U-Haul cites *Lebrón* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), as alternative support for the agency theory being preserved. *Lebrón* stands for the proposition that when a party has sought protection under the United States Constitution or a federal law, that

party may advance additional theories based on that claim that may not have been addressed by the lower courts. In *Lebrón*, appellant had claimed protection under the First Amendment. One argument advanced by petitioner was that Amtrak was a government entity, a theory that petitioner had "expressly disavowed" in the lower courts. *See id.* at 378. The Supreme Court permitted the government-entity argument as an alternative theory under appellant's First Amendment claim because a constitutional right was at stake. This Court has a comparable exception: "cases involving important constitutional or governmental issues may be exceptional and, as such, there should be a full legal treatment of all legal issues involved, whether squarely introduced by the parties or not." *T I Fed. Credit Union* v. *DelBonis*, 72 F.3d 921, 930 (1st Cir. 1995) (citing *National Ass'n of Social Workers* v. *Harwood*, 69 F.3d 622, 628 (1st Cir. 1995)). In this case, appellants are not advancing an alternative argument based on a claim of protection under the Constitution or federal law. Nor are important constitutional or governmental issues at stake. Neither *Lebrón* nor *Harwood*, then, saves appellants from forfeiture of their agency theory claim.

Appellant is also not entitled to application of the exception to the Rule 51 requirement set out in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981). In *City of Newport*, despite petitioner's failure to make a Rule 51 objection, the district court ruled on the substance of the waived argument. *See id.* at 253-54. The Supreme Court held that refusing to hear the claim on the merits when it was addressed by

both lower courts would further no interest in fair trial administration. *See id.* at 255-56. The Newport exception is inapplicable here, because the district court was not given the opportunity to address the substance of the agency argument. At no point in the record is there evidence that the district court addressed the agency argument on the merits. U-Haul's failure to bring the issue squarely before the district court bars application of this exception.

Had appellants fulfilled the requirements of Rule 51, review of the failure to give the jury an instruction on agency would have been governed by the "harmless error" standard of Federal Rule of Civil Procedure 61. Because appellants failed to preserve the issue on appeal, we will not examine whether an agency instruction should have been given instead of an integrated-enterprise instruction unless plain error is apparent. Accordingly, this circuit will only review an issue that has been forfeited on appeal "to prevent a clear miscarriage of justice," *Elgabri* v. *Lekas*, 964 F.2d 1255, 1259 n.1 (1st Cir. 1992), or "where the error 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Lash* v. *Cutts*, 943 F.2d 147, 152 (1st Cir. 1991) (quoting *Smith* v. *MIT*, 877 F.2d 1106, 1110 (1st Cir. 1989)).

Plain error might be found when "the failure to raise the claim below deprived the reviewing court of helpful factfinding; . . . the issue is one of constitutional magnitude; . . . the omitted argument is highly persuasive; . . . the opponent would suffer any special prejudice; . . . and, perhaps most importantly, . . . the issue is of

great importance to the public." *Play Time, Inc.* v. *DS Metromedia Communications, Inc.*, 123 F.3d 23, 30 n.8 (1st Cir. 1997). None of these factors apply to appellants' agency argument. The district court's failure to give the jury an agency instruction did not constitute plain error.

The Supreme Court has not addressed the issue of whether the integrated-enterprise test is appropriate in Title VII cases. The Court's decision in *Kolstad* does not change this, and U-Haul's reliance on this case is misplaced. Although *Kolstad* observed that Congress directed federal courts to interpret Title VII using agency principles, it only analyzed application of agency principles in the context of punitive damages and 42 U.S.C. § 1981a. *See* 527 U.S. at 539-46. The Court did not address single-employer issues at all; *Kolstad*, then, does not demand that plain error be found in this case.

This Court has also declined to reach the issue of what the proper test for determining employer status under Title VII is. In *Mas Marques* v. *Digital Equipment Corp.*, 637 F.2d 24 (1st Cir. 1980), we upheld the district court's holding that the plaintiff's single-employer claim did not meet the standards of any of the possible tests. We identified three "recognized" methods for determining whether a single employer exists under Title VII: the integrated-enterprise test, the corporate law "sham" test, and the agency test. *See id.* at 27. None of the three tests were explicitly adopted or excluded by the First Circuit. The integrated-enterprise test currently appears to be the standard adopted, or at least applied, by a majority of circuits that have reached the issue.

See Hukill v. *Auto Care, Inc.*, 192 F.3d 437, 442 (4th Cir. 1999) (FMLA, rather than Title VII claim); *Knowlton* v. *Teltrust Phones, Inc.*, 189 F.3d 1177, 1184 (10th Cir. 1999) (applying integrated-enterprise test without explicitly adopting it); *Swallows* v. *Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993-94, (6th Cir. 1997); *Cook* v. *Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995); *McKenzie* v. *Davenport-Harris Funeral Home*, 834 F.2d 930, 933 n.3 (11th Cir. 1987); *Childs* v. *Local 18, Int'l Bhd. of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983); *Trevino* v. *Celanese Corp.*, 701 F.2d 397, 403-404 (5th Cir. 1983). *Papa*, the case cited by U-Haul as applying agency principles, identified three instances in which it would be appropriate for a parent and subsidiary to be treated as a single employer under Title VII: (1) where the two corporations would be treated as one ("piercing the corporate veil") with regard to creditors' claims under corporate law; (2) where the subsidiary has been created to escape liability under the anti-discrimination laws; or, (3) where the parent corporation "directed the discussion, act, practice, or policy of which the employee of its subsidiary was complaining." *Papa*, 166 F.3d at 941. The Seventh Circuit's primary criticism of the four-factor integrated-enterprise test is that it could subject small firms to Title VII liability that should be protected by the fewer than fifteen (or twenty) employees exemption. *See id.* at 940. "[W]e are hesitant to find an error 'plain' where, as in this case, the legal basis for the proposed instruction . . . is not 'clearly established.'" *Elwood* v. *Pina*, 815 F.2d 173, 176 (1st Cir. 1987). The district court cannot be said to have

committed plain error by following the bulk of available precedent on the issue.

Appellant's argument that the integrated-enterprise test should not have applied and that agency principles should have been substituted has been forfeited for failing to meet the requirement of Rule 51 and for failing to bring the issue before the district court at any time during the proceedings. Instructing the jury on an integrated-enterprise test to determine single-employer status resulted in no miscarriage of justice. Nor did the instruction affect the fairness and integrity of the judicial proceeding. Accordingly, the district court's instruction was not plain error and is affirmed.

B. U-Haul's next argument is that the instruction on the integrated-enterprise test was incorrect. Our review of jury instructions is de novo to ascertain whether the challenged instruction has "a tendency to confuse or mislead the jury with respect to the applicable principles of law." *Tatro* v. *Kervin*, 41 F.3d 9, 14 (1st Cir. 1994). If the instruction is erroneous, a new trial will be ordered if the error, based on the entire record, was prejudicial. *See id.* We will not, then, reverse a judgment if the error that resulted from the incorrect instruction was harmless. *See id.*

The district court accurately set out the four factors of the integrated-enterprise test. U-Haul complains that the district court did not emphasize the control over labor relations factor and that the district court included other considerations beyond the four factors. The jury was instructed as follows (emphasis added):

> Now, to succeed on these claims, the plaintiff must first prove by a preponderance of the evidence, more likely true than not true, that each of the defendants in this case was her employer . . . . In order to determine whether U-Haul International was the plaintiff's employer, you must consider the relationship between U-Haul International and U-Haul Company of Maine, including the extent to which there is: one, *interrelation of operations*; two, *common management*; three, *centralized control of labor relations*; and four, *common ownership*.
>
> *Also, relevant* to this inquiry are *factors such as* whether U-Haul International exerts considerable influence over U-Haul Company of Maine's *personnel policies, advertising and other decisions*, and whether U-Haul International controls U-Haul Company of Maine's *sales goals, marketing strategies, sales catalogs*, and *advertising*.

We hold that the district court did not properly set out the integrated-enterprise test for the jury.

Of the circuits that have applied the integrated-enterprise test, there is near unanimity that control of labor operations i.e., control of employment decisions, is the most important of the four factors. See *Hukill*, 192 F.3d at 442; *Llampallas* v. *Mini-Circuits, Lab, Inc.*, 163 F.3d

1236, 1244-45 (11th Cir. 1998) (finding that control of employment decisions is critical under either integrated-enterprise or joint-employer test); *Lockard* v. *Pizza Hut, Inc.*, 162 F.3d 1062, 1070 (10th Cir. 1998); *Lusk* v. *Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997); *Swallows*, 128 F.3d at 994; *Cook*, 69 F.3d at 1241. We agree with the above circuits and adopt the view that control of employment decisions is a primary consideration in evaluating employer status.

Appellants argue that the district court erred in failing to instruct the jury that the ultimate question was whether the parent corporation was a final decision maker in connection with the employment at issue. The circuits have differed in the level of control that is required in order to satisfy the control of employment prong. The Fifth and Tenth Circuits have held that a "'parent's broad general policy statements regarding employment matters are not enough' to make the required showing of centralized control over labor relations. 'To satisfy the control prong, a parent must control the day-to-day employment decisions of the subsidiary.'" *Lockard*, 162 F.3d at 1070 (quoting *Frank* v. *U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993)); *see Lusk*, 129 F.3d at 777-78. The rationale for a more stringent requirement of inter-relatedness is based on the corporate law principle of limited liability. *See Lusk*, 129 F.3d at 778. Limited liability prevents a parent corporation from being held responsible for the acts of its subsidiaries unless the separateness of the entities is a sham, and "there is an absence of

an arm's-length relationship among the companies." *Knowlton*, 189 F.3d at 1184.

Although the argument for wholesale incorporation of limited liability has substantial support, the exclusive focus on individual hiring and firing decisions conflicts with the remedial public policy goal of anti-discrimination laws. *See Lusk*, 129 F.3d at 777 n.3. In addition, a stringent emphasis on the labor prong renders the other three factors of the integrated-enterprise test devoid of impact, essentially reducing the test to a one-question inquiry. We choose to follow the more "flexible" approach adopted by the Second Circuit which focuses on employment decisions, but only to the extent that the parent exerts "'an amount of participation [that] is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions.'" *Cook*, 69 F.3d at 1240-41 (quoting *Armbruster* v. *Quinn*, 711 F.2d 1332, 1338 (6th Cir. 1983)). Accordingly, we hold that the district court should have directed the jury to place particular emphasis on the interrelation of employment decisions between U-Haul International and U-Haul Company of Maine.

We now turn to the additional considerations on which the district court instructed the jury and which U-Haul contests were improper. The district court began the employer instruction by setting out the four factors of the integrated-enterprise test. The court then identified other "relevant" factors, such as influence over personnel decisions and advertising and establishment of sales goals and

marketing strategies. Appellants cite *Schweitzer* v. *Advanced Telemarketing Corp.*, 104 F. 3d 761 (5th Cir. 1997), in support of the argument that these additional factors should not have been included in the instruction. In *Schweitzer*, the district court added financing of the subsidiary by the parent and inadequate capitalization of the subsidiary to the integrated-enterprise test factors. *See Schweitzer* at 765. The Fifth Circuit found error in the instruction, holding that the additional factors were irrelevant to the single-employer inquiry. *See id.*

Appellants should have no complaint with the instruction by the district court to consider influence over personnel decisions. This goes directly to the most important factor, control of employment decisions, making it indisputably relevant to the jury's deliberations. As for sales, marketing, and advertising, these factors may be considered under the interrelation of operations prong, but only insofar as the parent is involved "directly in the subsidiary's daily decisions." *Lusk*, 129 F.3d at 778. The district court should have been clear that U-Haul International's involvement must have been proactive in order to be relevant. Furthermore, by singling out advertising, marketing, and sales, the instruction might have led the jury to believe that these factors took significance over other, equally important considerations. At a minimum, the district court should have identified these factors as examples falling under the interrelation of operations prong and provided other examples of

interrelation.[7] The inclusion of additional considerations in this manner when instructing on the integrated-enterprise test was error.

Having held that the jury instruction on the integrated-enterprise test should have identified control of employment as the most important, but not exclusive factor, we examine whether the error was harmful to the appellants such that the case must be remanded for a new trial. *See* Fed. R. Civ. P. 61. A new trial is necessary only "if the error could have affected the result of the jury's deliberation." *Allen* v. *Chance Mfg. Co.*, 873 F.2d 465, 469 (1st Cir. 1989). In making that determination, we consider whether we can say "with fair assurance that the judgment was likely unaffected." *Putnam Res.* v. *Pateman*, 958 F.2d 448, 471 (1st Cir. 1992). In this case, the error in the formulation of the integrated-enterprise test was one of emphasis, and there was substantial evidence presented at trial on the employer question. We hold that the incorrect jury instruction likely did not affect the ultimate determination by the jury that U-Haul International was appellee's employer, and the error, therefore, was harmless.

The errors in the integrated-enterprise instruction were harmless when considered with the single-employer evidence presented at trial. Romano offered the following evidence relating to

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[7] Examples include: shared employees, services, records, office space, and equipment, commingled finances, and handling by the parent of subsidiary tasks such as payroll, books, and tax returns. *See Knowlton*, 189 F.3d at 1184 n.7; *Lusk*, 129 F.3d at 778.

U-Haul International's status: (1) U-Haul Company of Maine is owned in its entirety by U-Haul International; (2) the two companies share three directors; (3) U-Haul International receives revenues from U-Haul of Maine's transactions as well as a daily report of the same; (4) U-Haul International establishes equipment rental rates; (5) U-Haul International provides accounting services to U-Haul of Maine; (6) U-Haul International provides legal, marketing, budgeting, accounting, and training services to U-Haul of Maine; (7) there is interchange of employees between the two companies; and, most importantly, (8) U-Haul International sets human resources and personnel policies, establishes the wage scale, the pay day, and all fringe benefits, must approve pay in excess of the scale, limits shift premiums and the hours of part-timers, processes payroll, prohibits payroll advances, must approve any rehire, maintains duplicate personnel records, and invites employees of U-Haul of Maine to present complaints concerning discrimination, sexual harassment and leaves of absence to U-Haul International's Human Resources Department. Based on this evidence, the jury could have concluded that each of the four factors of the integrated-enterprise test had been satisfied. Further, there were multiple examples of U-Haul International's involvement in employment-related matters. Even if the instruction had emphasized the control of employment prong, it is not apparent that the jury would have reached a different conclusion. The error, then, was not harmful, and no new trial is warranted.

C. Appellants' related challenge to the Special Verdict Question 1: "Did U-Haul International control the operations of U-Haul Co. of Maine to such an extent that U-Haul Co. of Maine's actions are attributable to U-Haul International?," is waived for failure to object to the question at the time of trial. While appellants repeatedly objected to the instruction given by the district court to the jury on the integrated-enterprise test, they did not mention Special Verdict Question 1 at either the charging conference or during their post-instruction objections. Our review is thus limited to plain error, *see Arthur D. Little, Inc.* v. *Dooyang Corp.*, 147 F.3d 47, 53 (1st Cir. 1998), of which there is none. Even under the abuse of discretion standard, Special Verdict Question 1 is not erroneous, because it does not conflict with our articulation of a proper integrated-enterprise instruction.

D. Appellants argue that there was insufficient evidence of an integrated-enterprise to support a finding that U-Haul International was appellee's employer.[8] Appellee counters that this argument is waived for failure to articulate the objection with specificity at the close of evidence. Whether or not appellants sufficiently renewed their objection[9] is not one we must

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[8]Appellants have not been clear whether they are challenging the submission of the question to the jury or the finding by the jury. We will treat the question, as did the district court in its Order denying judgment as a matter of law or a new trial, as a challenge to the jury verdict.

[9]All parties concede that appellants made the sufficiency argument at the close of appellee's case. The

address, because the evidence, as discussed above and viewed in the light most favorable to the appellee, is more than sufficient to uphold the determination by the jury. *See Transamerica Premier Ins. Co.* v. *Ober*, 107 F.3d 925, 929 (1st Cir. 1997). For the same reason, we decline to reverse the district court's denial of a new trial on this issue. *See id.* (verdict must be so contrary to the evidence that a miscarriage of justice would result).

II. Damages

A. The Supreme Court decided *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), just prior to the commencement of this trial. After commenting that *Kolstad* had potential impact on the case, the district court determined that its application would be resolved at the conclusion of evidence at trial. In this appeal, appellants challenge the jury verdict finding punitive damages as improper under *Kolstad*. Appellee counters that the argument is waived, not having been properly raised in appellants' motion for judgment as a matter of law. Given the relatively contemporaneous occurrence of the *Kolstad* decision and the trial in this case, as well as the district court's decision to address *Kolstad* after the close of evidence, we will address appellants' *Kolstad* argument.

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waiver issue concerns whether appellants incorporated this argument into their motion for judgment as a matter of law at the close of all evidence, as required to preserve the issue for appeal.

Kolstad addressed the availability of punitive damages in Title VII cases under 42 U.S.C. § 1981a(b)(1); specifically, in what category of discrimination cases a plaintiff may recover punitive damages. The Court held that Congress intended to authorize punitive damages in "only a subset of cases involving intentional discrimination." *Id.* at 534. The Court interpreted the statute's "malice" or "reckless indifference to the federally protected right [ ]," however, as not requiring evidence that the misconduct was egregious. *See id.* at 535. Instead, the inquiry should focus on the acting party's state of mind. *See id.* Thus, punitive damages are available in cases in which the employer has, at minimum, engaged in the discriminatory action "in the face of a perceived risk that its actions will violate federal law." *Id.* at 536.

The Court went on to discuss imputing punitive damages liability for the bad acts of the individual onto the employer. Common law limits vicarious liability for punitive damages through agency principles. *See id.* at 541. As such, the Court held that an employer may be liable for punitive damages under Title VII in four instances: (1) when the agent has been authorized by the principal to commit the misconduct in question; (2) when the principal recklessly employed the unfit agent; (3) when the agent, acting in a managerial capacity, committed the misconduct within the scope of the employment; or, (4) when the agent's bad act was subsequently approved by the principal. *See id.* at 542-43. The Court limited the reach of the third situation by absolving an employer from

liability for punitive damages if a good-faith effort to comply with the requirements of Title VII is made. *See id.* at 545-46. It is this aspect of the *Kolstad* holding that is most critical to the instant case.

The district court issued a proper *Kolstad* jury instruction on the issue of punitive damages:

> You may award the plaintiff punitive damages if you find . . . that the acts or omissions of the defendants were done maliciously or with reckless indifference to her federally protected rights . . . . You are not to award punitive damages against U-Haul International or U-Haul Company of Maine if you find that they made a good-faith effort to prevent discrimination in the workplace.

Appellants argue that the jury findings with respect to state of mind of the individuals who fired Romano, the managerial status of those individuals, and the efforts of U-Haul International and U-Haul Company of Maine to comply with Title VII were unsupported by the evidence presented at trial. We reject each of these contentions in turn.

As to the state of mind, there is ample evidence to suggest that Nadeau, Romano's immediate supervisor, was aware that firing Romano was discriminatory. Smedberg, the U-Haul of Maine President who allegedly ordered the firing, apparently knew about U-Haul's anti-discrimination policies. Construing the

evidence most favorably to appellee, the jury could have reasonably concluded that the actions by Nadeau and Smedberg were taken with reckless disregard to appellee's federal rights.

The argument that Smedberg cannot be a "manager" of U-Haul International because he allegedly did not work for U-Haul International also fails. After finding that U-Haul International and U-Haul Company of Maine were a single employer for purposes of Title VII, Smedberg's position as President of U-Haul Company of Maine qualifies him as a manager of U-Haul International as well. *See Lowery* v. *Circuit City Stores, Inc.*, 206 F.3d 431, 447 (4th Cir. 2000).

Appellants' assertion that appellee bears the burden of proving appellants' lack of good faith efforts to comply with Title VII is incorrect. Although *Kolstad* does not state specifically which party must put forth such evidence, the good-faith aspect of *Kolstad* has subsequently been characterized as an affirmative defense, *see Passantino* v. *Johnson & Johnson Consumer Prods. Inc.*, 212 F.3d 493, 516 (9th Cir. 2000); *Deffenbaugh-Williams* v. *Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999), and an exception to vicarious liability, *see Odgen* v. *Wax Works, Inc.*, 214 F.3d 999, 1009 (8th Cir. 2000); Lowery, 206 F.3d at 445; *Remedies: Kolstad's "Good-Faith" Defense Means What It Says*, 15 NO. 2 Fed. Litigator 47 (Feb. 2000). We agree with these characterizations. The defendant, therefore, is responsible for showing good faith efforts to comply with the requirements of Title VII.

Kolstad did not articulate any specific evidence necessary for a finding of good-faith effort. Circuit and district courts have since attempted to add substance to the standard, and we are persuaded by their general conclusions. We hold that a written non-discrimination policy is one indication of an employer's efforts to comply with Title VII. *See Lowery*, 206 F.3d at 446. But a written statement, without more, is insufficient to insulate an employer from punitive damages liability. *See Odgen*, 214 F.3d at 1010; *EEOC* v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248 (10th Cir. 1999). A defendant must also show that efforts have been made to implement its anti-discrimination policy, through education of its employees and active enforcement of its mandate. "Although the purpose of Title VII is served by rewarding employers who adopt anti-discrimination policies, it would be undermined if those policies were not implemented, and were allowed instead to serve only as a device to allow employers to escape punitive damages for the discriminatory activities of their managerial employees." *Passantino*, 212 F.3d at 517.

Appellants did put forth evidence regarding their efforts to comply with anti-discrimination law. Both U-Haul International and U-Haul of Maine distribute materials regarding their policies of hiring women, minorities, and disabled persons. Managers and supervisors are advised that termination because of gender is prohibited by law and are instructed to hire on the basis on qualifications and not on discriminatory factors. U-Haul, however, did not put forth evidence of an active mechanism for renewing employees'

awareness of the policies through either specific education programs or periodic re-dissemination or revision of their written materials. There was no testimony by appellants' witnesses that indicated that supervisors were trained to prevent discrimination from occurring. Further, appellants did not give examples in which their anti-discrimination policies were successfully followed. We do not hold that appellants were required to present evidence on *all* of these factors in order to qualify for the good-faith defense. But based on the evidence that was presented to the jury, construed most favorably for the appellee, we find that the jury's conclusion in this regard was reasonable, and we will not disturb the verdict.

B. Appellants next argue that the district court erred in resubmitting the compensatory and nominal damages questions to the jury after the jury returned an initial verdict of $0 in compensatory damages and $15,000 in nominal damages. The district court determined that there was a mistake on the verdict form; that the $15,000 nominal damages award did not accord with the district court's instructions that nominal damages be minimal, "such as one dollar." The district court surmised that the jury probably confused nominal with compensatory damages and proposed resubmitting the two questions, after repeating the jury instructions, to the jury. The ultimate result of the resubmission resulted in the jury awarding $15,000 in compensatory damages and $0 in nominal damages.

Appellants did not object to the resubmission of the compensatory and nominal damages questions. In conference with the district judge, appellants suggested either resubmission of all the damages questions (i.e., including punitive damages) or declaring a mistrial because the jury "is fatally confused on the concept of damages . . . [including] punitive damages." On appeal, appellants change tack, arguing that the jury was not confused and that the district court should not have resubmitted questions to the jury, but instead should have accepted the nominal damages award and reduced it accordingly.

The standard of review for a determination of resubmission of special verdict questions is for abuse of discretion. *See Scott-Harris* v. *City of Fall River*, 134 F.3d 427, 435 (1st Cir. 1997), *rev'd sub nom. on other grounds Bogan* v. *Scott-Harris*, 523 U.S. 44 (1998). A failure to object to verdict inconsistency before the jury is discharged constitutes waiver. *See Coastal Fuels of P.R., Inc.* v. *Caribbean Petroleum Corp.*, 79 F.3d 182, 201 (1st Cir. 1996). Appellants' failure to object to resubmission when the district court gave both parties an opportunity to voice any objections similarly limits our review. We review the district court's decision, then, for plain error and hold that none is evident in the resubmission of the questions on compensatory and nominal damages.

The district court characterized the verdict as improper because the jury awarded $15,000 in nominal damages. Nominal damages are intended to recognize a plaintiff's legal injury

when no actual monetary damages may be discerned. *See Magnett* v. *Pelletier*, 488 F.2d 33, 35 (1st Cir. 1973). The amount of nominal damages that may be awarded is not limited to $1. The nature of nominal damages compels, however, that the amount be minimal, and we have held that an amount of even $500 exceeds the appropriate higher boundary of nominal damages. *See id.* ("Five hundred dollars charged against an individual police officer is no mere token.") The district court was correct, then, in concluding that the jury could not have understood the concept of nominal damages properly. Appellants contend that this apparent mistake on the part of the jury is a mistake only as to the amount that they could award in nominal damages. The district court disagreed, surmising that the jury probably confused nominal with compensatory damages, prompting the decision to resubmit both questions. Appellants argue that resubmission was improper because special verdict questions may only be resubmitted to the jury when there is an inconsistency within the verdict and there is no view of the verdict that can reconcile the inconsistency. *See Santiago-Negrón* v. *Castro-Dávila*, 865 F.2d 431, 444 (1st Cir. 1989). Appellants are correct that there was not an inconsistency within this verdict under all possible views. Had the district court adopted appellants' version of the jury's error, the nominal damages award would not be inconsistent with any other part of the verdict, but instead only incorrect as to the nominal damages instruction. This is not a case, then, in which the verdict is "inconsistent" as identified in *Santiago-Negrón*.

Under either the district court's or appellants' interpretations, however, the jury was obviously unclear as to the proper role for nominal damages. In *Atlantic Tubing & Rubber Co.* v. *International Engraving Co.*, the jury returned a verdict that the district judge believed contained answers to special interrogatories that were either "inconsistent or ambiguous." 528 F.2d 1272, 1275 (1st Cir. 1976). The district court accordingly determined that additional, clarifying questions needed to be submitted to resolve the confusion. In examining this decision, we held that the trial court had "considerable discretion . . . [in its decision whether to refuse] to enter judgment on the bases of a jury's answer to a set of interrogatories," and that such a decision "should not be reversed simply because an appellate court concludes that it is possible to reconcile the jury's responses." *Id.* at 1276 (cited with approval in *Santiago-Negrón*, 865 F.2d at 444). In another case, we upheld the district court's resubmission of a jury question for clarification as "precisely correct" and affording the jury a "timely opportunity to straighten out both apparent, and possible mistakes." *Poduska* v. *Ward*, 895 F.2d 854, 857 (1st Cir. 1990). *See also Smith* v. *Riceland Foods, Inc.*, 151 F.3d 813, 821 (8th Cir. 1998) ("A district court has discretion to decide whether a jury's findings on a verdict form are incomplete, confusing, or inconsistent and whether to resubmit the claim to the jury.").

The jury confusion in this case resembles that found in *Atlantic Tubing* and *Poduska*, and thus the requirement of absolute inconsistency established in *Santiago-Negrón* does not apply.

The district court's decision to resubmit the two questions and allow the jury an opportunity to correct its mistake does not rise to the level of plain error, or even abuse of discretion. The jury had not yet been discharged, and counsel was provided with a full opportunity to object to the resubmission. *See Santiago-Negrón*, 865 F.2d at 444. The district court's interpretation of the jury's verdict made logical sense. It did not take the decision-making role away from the jury and gave the jury a second chance to render a proper verdict. The district court was clear in its instruction of what appellee needed to prove in order to be entitled to compensatory damages. There is no indication that the jury disregarded the jury instructions on damages on second hearing. The jury was not forced or coerced by the judge into reversing the nominal and compensatory damages awards. They could have simply reduced the nominal damages to an appropriate amount. We conclude that the district court took the appropriate and "safest" course. *Scott-Harris*, 134 F.3d at 435.

Because we affirm the district court's decision to reinstruct on compensatory and nominal damages, we need not address appellants' arguments regarding the availability of punitive damages in the absence of compensatory damages.

C. U-Haul's final argument is that the punitive damages award is grossly excessive and violates the Fifth and Fourteenth Amendments. The jury award of $625,000 was reduced to $285,000 by the district court to conform with the punitive damages cap imposed by 42 U.S.C. §

1981a(b) (3). Appellants allege that the 19 to 1 ratio between punitive and compensatory damages cannot stand when measured by the three guideposts identified by the Supreme Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996). For the reasons set out below, we disagree.

Review of a punitive damages award is de novo, and the award will stand unless we find it "certain" that the amount in question exceeds that necessary to punish and deter the alleged misconduct. *See Quint* v. *A.E. Staley Mfg. Co.*, 172 F.3d 1, 14 n.11 (1st Cir. 1999). Similarly, in *BMW*, the Supreme Court identified punitive damages awards that "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment" as those that surpass the goals of punishment and deterrence. 517 U.S. at 568. Fundamental to the due process analysis is whether the defendant received fair notice that the conduct in question was prohibited and what the potential penalty for engaging in that conduct could be. *See id.* at 574. To facilitate this inquiry, the Court provided three "guideposts" useful in determining whether a defendant received adequate notice of the punitive damages award: (1) the degree of reprehensibility of a defendant's conduct; (2) the ratio between punitive and actual and potential damages; and, (3) a comparison of the punitive damages figure and other civil and criminal penalties imposed for comparable conduct. *See id.* at 574.

This case was brought under Title VII of the Civil Rights Act of 1964, and the punitive

damages award was authorized and limited by 42 U.S.C. § 1981a. A congressionally-mandated, statutory scheme identifying the prohibited conduct as well as the potential range of financial penalties goes far in assuring that appellants' due process rights have not been violated. In explaining why a comparison of comparable penalties is important to the excessiveness inquiry, the Court commented: "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue."' *Id.* at 583 (quoting *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). Accordingly, a punitive damages award that comports with a statutory cap provides strong evidence that a defendant's due process rights have not been violated. *See EEOC* v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999).

Even subjecting the $285,000 award to the *BMW* three-guidepost analysis, we find that the amount is constitutionally permissible. To begin, we note that the level of reprehensibility of appellants' alleged misconduct is "perhaps the most important indicium." *BMW*, 517 U.S. at 575. Viewing the evidence most favorably to the non-moving party, we conclude that the harms inflicted upon Romano were more than "purely economic in nature." *Id.* at 576. According to testimony, Romano was fired from her job as a customer service representative after less than two weeks of work, because she "sit[s] when she pees." This statement, and those made

subsequently to her former husband, her father, and to the man hired to replace her, likely came as a humiliating shock and evinced a blatant disregard of federally and state-mandated anti-discrimination laws. In addition, evidence was presented at trial suggesting that Nadeau had said he would deny all of the alleged comments that he made regarding Romano being terminated because of her sex in the event of a discrimination suit. Given the testimony that appellants knowingly violated appellee's federally protected rights and then attempted to conceal this violation, we find that appellants' actions were more reprehensible than would appear in a case involving economic harms only. *See id.* at 579.

The second consideration in the *BMW* analysis is proportionality. The Court dismissed any simple, mathematical formula in favor of general inquiry into reasonableness. *See id.* at 582-83. As such, "particularly egregious" conduct that results in relatively low actual damages can support a higher ratio than conduct, that is less reprehensible. *See id.* at 582. Most ratios will fall within an acceptable range, with only a 500 to 1 disparity being explicitly cited by the Court as "'rais[ing] a suspicious judicial eyebrow.'" *Id.* at 583 (quoting *TXO Prod. Core.* v. *Alliance Res. Corn.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)). In this case, the ratio between punitive and compensatory damages was 19 to 1. Given the low actual damages due to appellee's short period of employment and the difficulty in measuring actual damages in a case involving "primarily personal" injury, we hold that this is a

constitutionally acceptable ratio between punitive and compensatory damages. *Deters* v. *Equifax Credit Info. Servs.*, 202 F.3d 1262, 1273 (10th Cir. 2000).

Finally, there are no civil or criminal penalties imposed for comparable misconduct here. Enforcement of Title VII is delegated to the private citizen who has suffered an injury. But as discussed above, a defendant, through the statutory scheme of Title VII and the punitive damages cap figures set out therein, has full notice of the potential liability to which it was subject. *See Deters*, 202 F.3d at 1272. Appellants' due process claim as to the amount of punitive damages awarded is rejected.

CONCLUSION

We hold that U-Haul's argument for an agency standard rather than the integrated-enterprise test in determining U-Haul International's status as Romano's employer is waived for failure to object according to the requirements of Rule 51. The error in formulating the integrated-enterprise test for the jury is harmless, and the jury finding that U-Haul International was Romano's employer for purposes of Title VII liability is upheld. The district court's resubmission of special interrogatories on nominal and compensatory damages was proper. Finally, the imposition of punitive damages liability on U-Haul does not violate *Kolstad*, nor is the punitive damages award constitutionally excessive. On all issues, we **affirm** with costs awarded to appellee.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KAREN ROMANO, Plaintiff	)	
v.	)	Civil 98-0106-B
U-HAUL INTERNATIONAL, INC, et al.	)	
Defendants	)	

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

Defendants, U-Haul International, Inc. ("UHI"), and U-Haul Co. of Maine, Inc. ("UHCM"), move for judgment as a matter of law, a new trial, and, in the alternative, for remittitur following a jury verdict finding them liable for sex discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*, and awarding Plaintiff, Karen Romano, a total of $15,000 in compensatory damages and $625,000 in punitive damages. The Court reduced the punitive damages award to $285,000 in conformity with 42 U.S.C. § 1981a(b)(3).

In their Motion for Judgment as a Matter of Law, Defendants restate legal and factual arguments made in their Motion for Summary

Judgment and at trial. The Court rejects these arguments for the reasons previously stated on the record. A jury verdict may be set aside "only after a determination that the evidence could lead a reasonable person to only one conclusion." *Hendricks & Assoc., Inc. v. Daewoo Corp.*, 923 F.2d 209, 214 (1st Cir. 1991) (internal quotation and citations omitted). A court is "compelled . . . even in a close case, to uphold the verdict unless the facts and inferences, when viewed in the light most favorable to the party for whom the jury held, point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at this conclusion." *Hendricks & Assoc., Inc.*, 923 F.2d at 214 (internal quotation and citation omitted). Having reviewed the trial record, the Court declines to disturb the jury verdict. The evidence presented at trial did not compel a verdict in UHI and UHCM's favor. Defendants' Motion for Judgment as a Matter of Law is DENIED.

The Court also declines to order a new trial. A court "may not upset the jury's verdict merely because he or she might have decided the case differently." *Velasquez v. Figueroa-Gomez*, 996 F.2d 425, 428 (1st Cir. 1993). Rather, a new trial is appropriate only if "the verdict was so clearly against the weight of the evidence as to amount to a manifest miscarriage of justice." *PH Group Ltd. v. Birch*, 985 F.2d 649, 653 (1st Cir. 1993). As discussed above, the Court cannot conclude that the weight of the evidence clearly dictated a verdict different than the one rendered by the jury. Defendants' Motion for a New Trial is DENIED.

In their Motion for Remittitur, Defendants argue that the $285,000 punitive damages award violates the Due Process Clause of the Fifth and Fourteenth Amendments and is excessive and should be reduced. In order for a punitive damages award to be constitutionally excessive, a the Court must consider (1) the degree of reprehensibility of the conduct; (2) the ratio between compensatory and punitive damages; and (3) the sanctions for comparable misconduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575-583 (1996). A Court can also overturn a damages award if "it is 'grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand.'" *Blinzler v. Marriott Int'l. Inc.*, 81 F.3d 1148, 1161 (1st Cir. 1996) (quoting *Correa v. Hospital San Francisco*, 69 F.3d 1184, 1197 (1st Cir. 1995)). The Court finds that the punitive damages award, already reduced by this Court in accordance with the statutory cap of Title VII, neither violates Due Process nor is excessive as a matter of law.

The Court is persuaded, after thoroughly examining the record, that the jury rendered a supportable verdict and that the present damages award is not excessive. Defendants' Motions for Judgment as a Matter of Law, for a New Trial,

and, in the alternative, for Remittitur are DENIED.

SO ORDERED.

/s/ Morton A. Brody
MORTON A. BRODY
United States District Judge

Dated this 28th day of October, 1999.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KAREN ROMANO,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civ. No.
	)	98-106-B
U-HAUL INTERNATIONAL, et al.,	)	
	)	
	)	
Defendants	)	

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Morton Brody, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict on June 29, 1999 against defendants in the amount of $15,000 compensatory damages and $625,000 punitive damages.

It is ORDERED AND ADJUDGED that the plaintiff take $15,000 in compensatory damages and that plaintiff take $285,000 in punitive damages, plus interest, attorney's fees and costs, the award being reduced in conformance with 42 U.S.C. § 1981 a(b)(3).

SO ORDERED.

Dated this 15th day of July, 1999.

/s/ Morton A. Brody

MORTON A. BRODY

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KAREN ROMANO,	)	
	)	
Plaintiff	)	
	)	
vs.	)	CIVIL 98-0106-B
	)	
U-HAUL INTERNATIONAL, et al.,	)	
	)	
	)	
Defendants	)	

AMENDED JUDGMENT

This matter came on for trial before the Court and a jury, Honorable Morton A. Brody presiding, and the issues having been duly tried and the jury having rendered its verdict on June 29, 1999 against defendants in the amount of $15,000.00 compensatory damages and $625,000.00 punitive damages, and pursuant to the Order and Memorandum of Decision entered by the Court on October 28, 1999, denying Defendants' Motions for Judgment as a Matter of Law, for New Trial and in the alternative, for Remittitur;

It is hereby ORDERED AND ADJUDGED, that the plaintiff take $15,000.00 in compensatory damages and that plaintiff take $285,000.00 in punitive damages, plus interest, attorney's fees and costs, the award being

reduced in conformance with 42 U.S.C. § 1981a (b) (3).

/s/ Julie G. Walentine

Julie G. Walentine

Deputy Clerk

Dated this 29th day of October, 1999.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-2328

KAREN ROMANO,
Plaintiff-Appellee,

v.

U-HAUL INTERNATIONAL, U-HAUL COMPANY OF MAINE, INC.,
Defendants-Appellants.

BEFORE

TORRUELLA, Chief Judge,
SELYA*, BOUDIN, STAHL, LYNCH and LIPEZ
Circuit Judges,
CASELLAS** and SARIS***, District Judges.

ORDER OF COURT

Entered: February 13, 2001

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Phoebe D. Morse, Clerk

By: /s/ Janice M. O'Neil

Chief Deputy Clerk

---

*Judge Selya is recused from this matter.
*Of the District of Puerto Rico, sitting by designation.
*Of the District of Massachusetts, sitting by designation.

[cc: Mr. Young and Ms. McChesney]

APPENDIX D

42 U.S.C. § 2000e

§ 2000e. Definitions

For the purposes of this subchapter—

. . .

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

. . .

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters

thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. § 1981a

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g)

of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

. . .

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

. . .

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Supreme Court, U.S.
FILED
JUN 13 2001
OFFICE OF THE CLERK

No. 00-1700

In The

Supreme Court of the United States

U-HAUL INTERNATIONAL, INC., ET AL.,

Petitioners,

v.

KAREN ROMANO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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June 13, 2001

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by holding that Petitioners failed to preserve the various legal theories that they ask this Court to consider by (1) failing to seek proper jury instructions, and (b) failing to object to the re-submission of the damages issues to the jury?

2. Whether Petitioners have forfeited their right to present their "common law" theories of agency liability by changing legal theories at each level of the courts below?

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STATEMENT OF THE CASE

Karen Romano ("Romano") worked at the Waterville, Maine U-Haul Center from May 1 through May 15 or 16, 1996. Neither the classified advertisement to which she responded, nor the paperwork which she completed at the time of hire, nor anything at the Waterville Center location indicated that she was employed by U-Haul Company of Maine ("UHCM"). Transcript 88, 90-91, 93, 254.[1] Romano understood that she was employed by "U-Haul," not by UHCM. Tr. 88-92. UHCM is a wholly-owned subsidiary of U-Haul International, Inc. ("UHI") (collectively "U-Haul" or "Petitioners"). Following her hire, Romano received a "Welcome Aboard" handbook published by UHI and signed by UHI's President. The handbook invited Romano to present any complaints of discrimination to UHI.

In its decision, *Romano v. U-Haul International, Inc.*, 233 F.3d 655, 667-68 (1st Cir. 2000), the Court of Appeals summarized the relationship between UHI and UHCM as follows:

> (1) U-Haul Company of Maine is owned in its entirety by U-Haul International; (2) the two companies share three directors; (3) U-Haul International receives revenues from U-Haul of Maine's transactions as well as a daily report of the same; (4) U-Haul International establishes equipment rental rates; (5) U-Haul International provides accounting services to U-Haul of Maine; (6) U-Haul International provides legal,

---

[1] All references to the trial transcript are denoted hereinafter as "Tr." followed by the page number.

> marketing, budgeting, accounting, and training services to U-Haul of Maine; (7) there is interchange of employees between the two companies; and, most importantly, (8) U-Haul International sets human resources and personnel policies, establishes the wage scale, the pay day, and all fringe benefits, must approve pay in excess of the scale, limits shift premiums and the hours of part-timers, processes payroll, prohibits payroll advances, must approve any rehire, maintains duplicate personnel records, and invites employees of U-Haul of Maine to present complaints concerning discrimination, sexual harassment and leaves of absence to U-Haul International's Human Resources Department . . . Further, there were multiple examples of U-Haul International's involvement in employment-related matters.

On Romano's second work day, the Waterville Center manager received a phone call from UHCM President Paul Smedberg questioning Romano's hire as a hitch mechanic. Following the call, the local manager told Romano that U-Haul "didn't want women installing hitches, that women are supposed to be working in the main office." Tr. 109-10. Four work days later, the local manager terminated Romano, stating "they came in over [my] head" and that "The only problem you have is you sit when you pee." Tr. 120, 122-23. The local manager subsequently told Romano's then-husband, her father, and the man hired to replace Romano that the termination was discriminatory.

Romano initially sued UHI as the lone defendant for violation of Title VII. UHI moved for summary judgment,

asserting that UHCM was Romano's employer. UHI conceded in its summary judgment brief that in some instances a parent company could be liable for the acts of its subsidiary under either a single ("integrated enterprise") or joint employer theory. After Romano amended her complaint to add UHCM as a defendant, the District Court denied summary judgment, indicating that factual issues relating to the determination of the proper defendants would be resolved at trial.

Before the trial began and at the charge conference, the District Court ruled that it would instruct the jury on the four-factor integrated enterprise test to determine whether UHI controlled UHCM's operations to such an extent that UHCM's actions were attributable to UHI. U-Haul did not object to instructing the jury on the integrated enterprise test or to the special verdict question, asserting only that the trial court should give greater emphasis to the control factor and should also instruct on U-Haul's proposed "joint employer" theory. Petitioners *never* raised any agency argument in response to the trial court's proposed instructions.

The jury returned a verdict awarding $0 compensatory damages, $15,000 nominal damages, and $625,000 punitive damages. Believing that the jury had confused compensatory and nominal damages, the District Court charged the jury again on these issues without specific objection by U-Haul. After further deliberation, the jury returned a verdict switching the compensatory and nominal damage awards. On July 15, 1999, the District Court entered judgment for Romano of $15,000 in compensatory and $285,000 in punitive damages after reductions to

conform with the damage caps. See 42 U.S.C. § 1981a(b)(3).

In post-trial motions, Petitioners again failed to make any agency argument. U-Haul's new post-trial counsel declared at argument on the motions, "And I think the memoranda filed by the parties show that the parties don't necessarily disagree as to the standard or the factors that should be considered when determining whether there, in fact, was [an] integrated employer, but we do disagree on the emphasis or the importance of the particular factors." Appendix 363. The District Court denied the post-trial motions and entered an amended judgment in Romano's favor on October 29, 1999.

On appeal, the First Circuit concluded that Petitioners had waived their agency argument and that the failure to instruct on this theory was not plain error. The Appeals Court noted that the majority of the circuits have adopted or applied the integrated enterprise test. The Appeals Court further concluded that the District Court had accurately set out the four factors of the integrated enterprise test but had failed to give proper emphasis to the control prong. However, the First Circuit stated, based on the facts quoted above, "Even if the instruction had emphasized the control of employment prong, it is not apparent that the jury would have reached a different conclusion" and therefore, the Appeals Court found the error to be harmless. *Romano*, 233 F.3d at 668. The Appeals Court further concluded that the District Court had given a proper instruction on punitive damages and had not erred in resubmitting the compensatory and nominal damages verdicts. Accordingly, the Appeals Court affirmed the District Court's decision in full. The

panel and the Appeals Court rejected a subsequent Motion for Rehearing and Rehearing en banc. This petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS FAILED TO PRESERVE FOR REVIEW THE INTEGRATED ENTERPRISE AND AGENCY LAW ISSUES.

The First Circuit held that Petitioners' "argument that the integrated-enterprise test should not have been applied and that agency principles should have been substituted has been forfeited for failing to meet the requirement of Rule 51 and for failing to bring the issue before the District Court at any time during the proceedings."[2] *Romano*, 233 F.3d at 665. As the Appeals Court noted, it treats seriously the procedural requirements of Rule 51. *Id.* at 663 ("The requirement that the grounds for objecting to a jury instruction must be distinctly stated is treated seriously by this Court."). Petitioners, however, apparently believe that the Supreme Court of the United States is less serious about violations of the Federal Rules of Civil Procedure. They do not directly challenge the First Circuit's determination that they violated Rule 51 and thus have forfeited the issues that they now present

[2] Fed. R. Civ. P. 51 provides in pertinent part: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

for review. Petitioners ask this Court to overlook their procedural missteps at trial and to ignore the unchallenged rulings of the First Circuit as to those procedural errors. This Court should decline so brazen an invitation to usurp both the Rules and the lower courts.

In fact, this Court treats with utmost seriousness violations of Rule 51. See *Palmer v. Hoffman*, 318 U.S. 109, 119-20 (1943) (a general exception to partially erroneous jury instruction not sufficient to preserve error for appeal). It will consider issues not properly raised in the courts below only in "exceptional cases or particular circumstances . . . where injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 522, 557 (1941). This is not such a case. And, as the First Circuit pointed out, Petitioners are not entitled to the exception carved out in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). See *Romano*, 233 F.3d at 664. Unlike in *City of Newport*, the District Court here never had the opportunity to consider Petitioners' arguments that the proper test to determine whether UHI was Respondent's employer is some variant of agency law, not the integrated enterprise test.[3]

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[3] The First Circuit characterized Petitioners' "common-law agency" argument as "entirely unclear." *Romano*, 233 F.3d at 662 n.6. The "agency" argument Petitioners advance before this Court is no less obscure. Prior to trial, Petitioners proposed a jury instruction (Request No. 8) to the effect that UHI could only be found to be Romano's employer if it were found to be UHCM's agent. At trial, U-Haul abandoned this request in favor of the integrated enterprise or joint enterprise test. Then, in their brief to the First Circuit, U-Haul's third set of counsel switched tack, urging the Court to adopt the "common-law analysis" purportedly set forth in *Papa v. Katy Indus.*, 166 F.3d 937 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999). In *Papa*, however,

This Court normally declines to consider questions presented in a petition for certiorari that have not been considered by the lower courts, *Patrick v. Burget*, 486 U.S. 94, 99, n.5 (1988), citing *Youakim v. Miller*, 425 U.S. 231, 234 (1976), or where petitioners advance arguments that are inconsistent with or contrary to the positions adopted at trial. *City of Newport*, 453 U.S. at 274 (Brennan, Justice, dissenting); see also, *Canton v. Harris*, 489 U.S. 378, 384-385 (1989) ("It is true that petitioner's litigation posture with respect to the questions presented here has not been consistent . . . respondent did not inform us prior to the time that review was granted that petitioner had

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the question before the court was whether the parent was the *principal* – a 180 degree flipflop from the argument U-Haul initially had made, then abandoned, in its pre-trial request. Now, before this Court, "agency" has undergone yet a third permutation. In arguing that "Supreme Court precedent mandates construction of Title VII under common-law agency principles," Petitioners cite with particular emphasis this Court's decision in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992), where the Court defined "employee" under ERISA pursuant to the master-servant relationship, as further defined by Restatement (Second) of Agency, Section 220. Under that definition, the issue of whether UHI is UHCM's agent, or vice-versa, is jettisoned, and Petitioners instead argue that UHI can only be found to be Respondent's employer if the traditional master-servant analysis applies. "Agency" has been a moving target in this litigation, and Petitioners have never focused their argument to allow the courts below to effectively grapple with it, much less decide it. Failure to define the issues is a separate ground for denying certiorari in this case. See *Canton v. Harris*, 489 U.S. 378, 385 (1989) ("These various presentations of the issues below might have been so inexact that we would have denied certiorari had this matter been brought to our attention at the appropriate stage in the proceedings").

arguably conceded this point below"). This important principle is informed by the Court's interest in fair and effective trial administration, as well as by the need to husband this Court's "scarce judicial resources." *City of Newport*, 453 U.S. at 256; *Canton*, 489 U.S. at 384. In the case at bar Petitioners violated this sound policy by violating Rule 51. Petitioners not only did not advance their agency argument to the District Court, but also have taken inconsistent positions in the courts below both as to the integrated enterprise issue and as to whether principles of agency law are the exclusive means of determining who the employer is in the parent/subsidiary context for Title VII purposes.

Petitioners now argue that the District Court erred when it applied the integrated enterprise test to determine whether UHI was Respondent's employer under Title VII. But, as the First Circuit found, and Petitioners do not dispute, "[t]hroughout these proceedings, U-Haul repeatedly made the argument that either the integrated-enterprise test or the joint-enterprise test should apply." *Romano*, 233 F.3d at 663. Indeed, in their Memorandum of Law in Support of their Motion for a New Trial, Petitioners continued to press the integrated enterprise test, arguing only that the trial court erred in applying this test by failing to emphasize the second factor – centralized control of labor relations – of the four-part analysis of this test. If it was error to proceed on the integrated enterprise theory (which Respondent denies), it was invited error of which Petitioners ought not to be heard to complain: "When an appellant's 'tactics backfire[ ]' he cannot complain of error he induced: 'a defendant cannot

have it both ways.' " *Johnson v. Immigration and Naturalization Service*, 971 F.2d 340, 343 (9th Cir. 1992), quoting *U.S. v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992).

Similarly, Petitioners have been anything but consistent in arguing that common-law agency principles are the *only* basis upon which UHI, as the parent corporation, can be found to be Respondent's employer. At trial Petitioners advanced two alternative theories – integrated enterprise and joint employer – neither of which is grounded in common-law agency principles. And, as noted *supra*, footnote 3, before the Court of Appeals Petitioners championed the analysis in *Papa*, 166 F.3d at 197, a case where the Seventh Circuit outlined *three* separate bases for finding a parent corporation liable for the torts of its subsidiaries, only one of which is arguably grounded in common-law agency principles. Petitioners did not restrict their reliance on *Papa* to the putative agency analysis in that case. Now, before this Court, while arguing the exclusive applicability of agency law principles, Petitioners fault the lower court's application of the integrated enterprise test as an unwarranted displacement of applicable state law of corporations, suggesting that, in addition to agency law, the law of corporations also informs the determination of "employer" under Title VII, an argument not previously advanced.

The scatter-shot approach that has characterized Petitioners' trial and appellate postures is perhaps a reflection of the fact that Petitioners have employed three separate sets of attorneys in this litigation – at trial, in post-trial motions, and upon appeal to the First Circuit. This is not a criticism of Petitioners' right to counsel. But

error, not strategy, should be the basis for a petition for certiorari. Petitioners can point to no error by the lower courts. Certiorari ought to be denied.

II. THERE ARE NO COMPELLING REASONS FOR GRANTING CERTIORARI.

"A petition for writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. Rule 10 outlines several "considerations" that the Court considers "compelling reasons." None of the issues raised by Petitioners rise to the level of "compelling reasons."

A. There Is No Conflict Between The District Court's Application Of The Integrated Enterprise Test And Supreme Court Precedent.

Petitioners cite a number of decisions of this Court for the proposition that only common-law agency principles can be used to determine whether a parent corporation is an employer of its subsidiary's employees for Title VII purposes. If those cases truly stood for that proposition, then arguably the District Court's use of the integrated enterprise test might conflict with this Court's precedent. In fact, however, Petitioners misstate the import of this Court's decisions in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). *Meritor*, *Faragher*, and *Ellerth* address the circumstances under which an employer can be held vicariously liable for the acts of its undisputed employees. *Nationwide* addresses the definition of

"employee" under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* None of these cases concern the definition of "employer" under Title VII. Thus, the First Circuit's decision here to apply the integrated enterprise test does not conflict with this Court's precedent.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), did not concern the employer issue in the parent/subsidiary context. In that case, the issue before this Court was whether the employer, a bank, was liable for the sexual harassment inflicted upon an employee by a supervisor employed by the bank. This Court found that the appeals court below had erred in concluding that employers automatically are liable for sexual harassment by their supervisors. The Court cited the definition of "employer" in 42 U.S.C. § 2000e(b), which includes any "agent" of an employer, as evidence that Congress intended to place some limits on the acts of employees for which employers under Title VII are to be held responsible. It is in that context that the Court stated "[C]ongress wanted courts to look to agency principles for guidance *in this area.*" *Meritor*, 477 U.S. at 72 (emphasis added). The Court was not suggesting that agency principles are to be used to determine whether a parent corporation is the employer of its subsidiary's employees.

Similarly, in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), there was no issue as to the identity of the employer. In *Ellerth*, the Court had to decide "whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of

employment, based on sex, but does not fulfill the threat." *Ellerth*, 524 U.S. at 754. The *Ellerth* Court examined agency principles of vicarious liability for harm caused by misuse of supervisory authority. Nowhere did the Court direct the lower courts to look to agency law to determine the identity of the employer in the parent/subsidiary context. It simply was not an issue.

In *Faragher*, 524 U.S. at 775, the issue before the Court was whether the employer, the City of Boca Raton, could be held vicariously liable for the conduct of two of the employee's immediate supervisors who had created a sexually hostile environment. The Court applied common-law agency principles to find that the City was vicariously liable for the torts of its supervisors. Again, there was no issue as to the identity of the employer.

In *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992), the issue before this Court was whether the putative employee was, in fact, an "employee," as defined in the ERISA statute. The Court mandated that the matter be resolved by applying an agency law definition of "employee." Petitioner extrapolates from this holding that since the "[d]efinitions [of "employer" and "employee"] are . . . mirror images of each other," therefore agency principles must be used to define "employer" in the Title VII context. The problem with this argument is that the Court in *Darden* did not address the definition of *employer* in Title VII. It did articulate a general principle of construction that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer . . . that Congress means to incorporate the established meaning of these terms." *Darden*, 503 U.S. at 322,

quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740 (1989). That interpretative principle must be tempered, however, by the caution issued by this Court in *Meritor*, 477 U.S. at 72, that "common-law principles may not be transferable in all their particulars to Title VII . . . ". See also *Kolstad v. American Dental Association*, 527 U.S. 526 (1999) (modifying agency standard for purposes of determining liability of employer for punitive damages for acts of its employees). The definition of "employer" in the parent/subsidiary context is one such area where agency principles are not readily transferable. That explains why the courts in virtually every federal circuit have resorted to some variant of a "single employer" test, in addition to common-law agency principles, to identify the "employer" for Title VII purposes in the parent/subsidiary context.[4]

Moreover, it is an inaccurate characterization of the Court's holding in *Darden* that the Court "instructed" that "tests created under the NLRA to judge employer-employee status should be rejected in favor of common law agency principles." Petitioners' Brief at p.7. The Court issued no such instruction.[5] Rather it noted that

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[4] The list of cases cited by Petitioners in their Brief at pages 13-15 is only partial. A more complete listing can be found at Shauna Wagner, *Annotation: Propriety of Treating Separate Entities as One for Purposes of Determining Number of Employees Required by Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e(b)) for Action Against Employer*, 160 A.L.R. Fed. 441 (2000).

[5] Indeed, in its recent decision in *Pollard v. E.I. duPont de Nemours & Co.*, No. 00-763 (U.S., June 4, 2001), this Court found it helpful, in determining whether front pay is to be considered as a compensatory damages award under Title VII, to seek

prior interpretations of "employee," not by the NLRB, but by the Court itself, could no longer be relied upon in light of subsequent amendments by Congress of the National Labor Relations Act.

Finally, Petitioners argue that the integrated enterprise test conflicts with *Kolstad*, 527 U.S. at 526. However, as the First Circuit noted:

> The Supreme Court has not addressed the issue of whether the integrated-enterprise test is appropriate in Title VII cases. The Court's decision in *Kolstad* does not change this, and U-Haul's reliance on this case is misplaced. Although *Kolstad* observed that Congress directed federal courts to interpret Title VII using agency principles, it only analyzed application of agency principles in the context of punitive damages and 42 U.S.C. § 1981a. *See* 527 U.S. at 539-46. The Court did not address single-employer issues at all;. . . .

Romano, 233 F.3d at 664. The First Circuit had it right. This Court has not addressed the integrated enterprise issue, nor is there any need to do so given the near unanimity as to the use of the test and given Petitioners' consent to try the case on this theory. Consequently, there can be no conflict between the Supreme Court and lower federal courts that apply that test.

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guidance from the language of a similar provision in the National Labor Relations Act, noting that the two provisions "closely tracked" each other.

B. Neither The District Court Nor The First Circuit Displaced Maine's State Law Of Corporations.

Petitioners' *Erie* doctrine argument was 1) never advanced at trial; 2) never advanced in post-trial memoranda; 3) never advanced in its brief to the First Circuit; and 4) never advanced at oral argument. Not until Petitioners filed their Petition for Panel Rehearing and Petition for Rehearing En Banc after the Court of Appeals issued its decision did Petitioners raise this issue. Pursuant to Fed. R. App. P. 40(a)(3), Respondent was not permitted to file a response. Therefore the issue was never fully briefed and neither lower court had the opportunity to pass on this issue. This is a new theory that ought not to be entertained for the first time on a petition for certiorari. *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988).

C. The Decision Of The First Circuit Is Not In Conflict With The Decision Of Any Other United States Court Of Appeals On The Same Important Matter.

Petitioners advance as a compelling reason for granting certiorari an alleged conflict among the Circuits on an important question of federal law. That is not the standard set forth in Supreme Court Rules, Rule 10(a). In relevant part, Rule 10(a) provides (emphasis added):

> [a] United States Court of Appeals has entered a decision in conflict with the *decisions* of another United States Court of Appeals on the same important matter;. . . .

This Rule contemplates something more than a general "split" among the Circuits on some important issue; at a

minimum, the decision upon which the Petitioners seek certiorari must actually conflict with a decision of another Circuit Court of Appeals. See, e.g., *Kolstad*, 527 U.S. at 526 (granting certiorari to resolve a conflict between decisions rendered by the District of Columbia Court of Appeals and the Second Circuit concerning the circumstances under which a jury may consider a request for punitive damages under 42 U.S.C. § 1981a(b)(1)); *PGA Tour, Inc. v. Martin*, No. 00-24 (U.S., May 29, 2001) (granting certiorari to resolve direct conflict between Seventh and Ninth Circuits over issue whether permitting use of golf cart would fundamentally alter golf competition). Such is not the case here.

Petitioners cite decisions from all federal circuits that have adopted or applied one or more "tests" to determine "employer" status under Section 1981a. But the First Circuit decision in *Romano* is in conflict with none of these. Contrary to Petitioners' representations, the First Circuit did *not* "reject[ ] the agency test in favor of the " 'integrated enterprise' test," nor did that court "adopt[ ]" the integrated enterprise test. Petitioners' Brief at 9, 13. Rather, the First Circuit merely found that the District Court did not commit plain error in applying the integrated enterprise test, given Petitioners' waiver of the agency test. *Romano*, 233 F.3d at 665. This decision, therefore, does not place the First Circuit in conflict with any other circuit court decisions, whether those courts may have adopted the integrated enterprise test or rejected it.

Petitioners have failed to demonstrate the requisite conflict between the First Circuit's decision and any other decision of the federal appeals courts. To grant certiorari in the absence of such conflict would open the door to

parties to bootstrap their petition on unrelated conflicts among the circuit courts to gain review here. Certiorari ought to be denied.

D. Petitioners Raise No Important Question Of Federal Law That Should Be Settled By The Supreme Court.

The final "compelling reason" urged upon this Court for granting certiorari is to settle an important question of federal law, namely, the alleged failure of the lower federal courts "[t]o realize that this Court's decisions in *Meritor, Ellerth, Faragher, Kolstad,* and [*United States v.*] *BestFoods* [524 U.S. 51 (1981)] are in *direct* conflict with application of the integrated enterprise test in Title VII cases." Petitioners' Brief at p. 15. (emphasis added). Petitioners proceed to cite a litany of evils that this Court can abate by granting certiorari and settling this important question of federal law. Romano will not respond to this list of putative ills simply because, as pointed out above, there is no conflict between Supreme Court jurisprudence and the lower federal courts in the application of the integrated enterprise test in Title VII cases. Absent that conflict, the litany of ills catalogued by Petitioners, whether real or conjured, will not be resolved by the Court addressing an imagined conflict that does not exist.

III. THE FIRST CIRCUIT DID NOT COMMIT ERROR IN AFFIRMING THE AWARD OF PUNITIVE DAMAGES AGAINST PETITIONERS AS A SINGLE EMPLOYER.

A. The First Circuit Correctly Found That The Award Of Punitive Damages Was Consistent With *Kolstad*.

Petitioners argue that, in the parent/subsidiary context, *Kolstad* requires "a separate analysis and finding as to *both* UHI's state of mind and UHI's good faith efforts to comply with Title VII." Petitioners' Brief at p. 22 (emphasis in original). This argument is no more than an attempt to re-litigate the identity of the "employer" at the damages stage of the litigation. *Kolstad* requires no such thing since that case did not arise out of or address the parent/subsidiary context. *Kolstad* held that punitive damages are available under Section 1981a only where the actor engaged in the discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. Principles of agency law must be used to impute punitive damages liability to the *employer* of the tort-feasor. However, even if, under agency law principles, an *employer* could be found vicariously liable for punitive damages for the torts of its managerial agent, it can escape this liability where it can demonstrate that the discriminatory actions of its managerial agent were contrary to the *employer's* good faith efforts to comply with Title VII.

The principles announced in *Kolstad* address the vicarious liability of the "employer." The First Circuit properly applied those principles to UHI/UHCM as the

"employer," once those entities had been found to be an integrated enterprise or a single employer and, as such, Romano's employer. That fact having been established, *Kolstad* did not require delving into the parent corporation's state of mind as if it were a separate entity for purposes of awarding punitive damages. As the First Circuit concluded, *Romano*, 233 F.3d at 664, Petitioners' reliance on *Kolstad* is simply misplaced.

B. Petitioners Waived The Issue Of Whether The District Court Erred In Re-Submitting The Compensatory And Nominal Damages Questions To The Jury.

U-Haul's argument that damages are not available under Title VII absent actual injury or compensatory damages and that nominal damages are unavailable altogether under Section 1981a hinges upon Petitioners' allegation that the trial court erred in re-submitting the compensatory and nominal damages questions to the jury. The trial court returned the verdict to the jury for further consideration of its initial awards of compensatory and nominal damages after it determined that the returned verdict form appeared to evidence confusion on the part of the jury concerning those two concepts. The First Circuit found that Petitioners had waived the re-submission issue by failing to object at the appropriate time. *Romano*, 233 F.3d at 670-671. Petitioners do not challenge this holding. As a consequence of the waiver of the re-submission issue, the First Circuit applied a "plain error" standard to determine the appropriateness of the re-submission. Finding no error, the court affirmed the compensatory damages award made by the jury after re-

submission, which provided, in turn, an adequate basis under the statute for the punitive damages award.

Petitioners fail to allege, much less demonstrate, that the First Circuit applied the wrong legal standard to determine the appropriateness of the re-submission or that it misapplied the "plain error" standard of review. Absent that threshold showing of error, there is no basis for review by this Court. Since the jury *did* award compensatory damages, punitive damages are clearly available under Title VII. And since the jury awarded compensatory damages, and not nominal damages, the issue of whether nominal damages are available under Section 1981a does not even arise. Certiorari ought to be denied.

IV. THE FIRST CIRCUIT'S HOLDING THAT PETITIONERS WAIVED THEIR ARGUMENTS AGAINST APPLICATION OF THE INTEGRATED ENTERPRISE TEST TO DETERMINE WHETHER UHI WAS ROMANO'S "EMPLOYER" DOES NOT IMPLICATE THE SUBJECT-MATTER JURISDICTION OF THE LOWER COURTS IN THIS CASE.

Romano established to the satisfaction of the jury that UHI was her employer. That essential fact, whether jurisdictional or not, was thus established at trial.[6] Accordingly, UHI's novel subject matter jurisdiction argument is devoid of merit.

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[6] As the First Circuit noted, "Appellants have not been clear whether they are challenging the submission of the [integrated enterprise] question to the jury or the finding by the jury." *Romano*, 233 F.3d at 668 n.8.

Even assuming, *arguendo*, that "employer" under Title VII were jurisdictional, the *test* whereby such a putatively jurisdictional fact is proven is not jurisdictional. Petitioners cite no case law to support the contrary proposition. The First Circuit did not hold that Petitioners waived their "right" to put Respondent to the proof that UHI was her employer, but only that Petitioners waived their ability to argue that one test for establishing employer status ought to be applied in the place of another. Petitioners ought not to be allowed to bootstrap this narrow holding into a challenge to the subject-matter jurisdiction of the lower courts. Certiorari ought to be denied.

CONCLUSION

Petitioners agreed below that the integrated enterprise test or the joint employer test was the appropriate test to determine what entity was Karen Romano's employer. This Court should not now grant certiorari to hear agency arguments which Petitioners have waived. No conflict exists over the application of the integrated enterprise test between the decision of the First Circuit in *Romano* and any other circuit. The *Kolstad* and subject-matter jurisdiction arguments advanced by Petitioners are simply an attempt to re-litigate the appropriateness of the integrated enterprise test. Finally, having waived the appropriateness of the resubmission issue, Petitioners' arguments that the punitive damages award is not supported by compensatory damages and that nominal damages are unavailable under Title VII do not merit

consideration. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
JUN 22 2001
OFFICE OF THE CLERK

No. 00-1700

IN THE

Supreme Court of the United States

U-HAUL INTERNATIONAL, INC., ET AL.,

Petitioners,

v.

KAREN ROMANO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners, U-Haul International, Inc. ("UHI") and U-Haul Co. of Maine, Inc. ("U-Haul Maine"), reply to Respondent's Opposition to the Petition for a Writ of Certiorari.

I. Rule 51 Waiver Is Not An Issue In This Case.

Romano's entire waiver argument is premised on the erroneous notion that Petitioners' purported lack of specificity in objecting to the integrated enterprise jury instruction constituted a waiver of their rights to seek review of the precise legal issue raised on summary judgment, motions for directed verdict, and post-trial motions for judgment as a matter of law ("JMOL") and for a new trial. *See* Opposition at 5-10. Romano's arguments are legally incorrect.

A. Rule 51 Waiver Does Not Bar Review Of A Denial Of A JMOL Motion.

"The grant of judgment as a matter of law is not an instruction within the meaning of Rule 51." Wright & Miller, Federal Rules Practice §2536. Rule 51 standards simply are not applicable in determining whether Petitioners preserved their rights to appeal the denial of their JMOL motion:

> In the case before us, the focus of petitioner's challenge is not on the jury instruction itself, but on the denial of its motions for summary judgment and a directed verdict. Although the same legal issue was raised both by those motions and by the jury instruction, "the failure to object to an instruction does not render the instruction the 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict." [Citation omitted.] Petitioner's legal position in the

> District Court . . . was consistent with the legal standard that it now advocates. It should not be surprising if petitioner's arguments in the District Court were much less detailed than the arguments it now makes in response to the decision of the Court of Appeals. That, however, does not imply that petitioner failed to preserve the issue raised in its petition for certiorari.

City of St. Louis v. Praprotnick, 485 U.S. 112, 120 (1988). *See also Boyle v. United Techs. Corp.*, 487 U.S. 500, 513-514 (1988).

B. Rule 51 Waiver Does Not Bar Review Of A Denial Of A Motion For Summary Judgment.

A legal issue raised in a summary judgment motion that is denied is preserved for appeal without being reasserted as an objection to a jury instruction:

> Plaintiff's arguments miss the point, because defendant did object to the denial of an earlier motion for summary judgment . . . defendant did not, after its denial, lose its rights by defending itself on the merits . . . . When rights have been duly saved, they are not lost, or waived, by subsequent proceedings which would not have taken place had the movant's position prevailed."

Scola v. Boat Frances R., Inc., 546 F.2d 459, 460 (1st Cir. 1976).

Denial of Petitioners' motion for summary judgment preserved their appellate rights, even if they had not moved for directed verdict or JMOL on that particular issue, which they did. *See Bottineau Farmers v. Elevator Woodward-Clyde Consultants*, 963

F.2d 1064, 1073 (8th Cir. 1992); *Grubb v. FDIC*, 868 F.2d 1151, 1160 (10th Cir. 1989); *Scola, supra; Streamfeeder v. Sure-Feed Sys., Inc.*, 175 F.3d 974, 984 n. 2 (Fed. Cir. 1999).

II. The Trial Court Squarely Considered And Decided The Legal Issue That The Integrated Enterprise Test And Not Common Law Agency Principles Would Govern This Case.

A. Petitioners Pressed The Issue Below.

UHI was brought into this action kicking and screaming that it was not and has never been Romano's "employer" under Title VII. UHI raised this argument so many times and in so many ways that Romano's counsel was moved to complain after trial:

> [T]his is déjà vu all over again. We've had this argument with respect to the integrated enterprise situation both at summary judgment, we had it at trial, we have a jury verdict that concluded the actions of U-Haul Company of Maine were attributable to U-Haul International, and we're now revisiting the issue yet again.

Post-Trial Hearing Tr. at 15.

At the outset, UHI expressly denied it was Romano's employer and pleaded as a defense that it was not her employer. Answer ¶ 51; 19th and 20th Defenses. UHI then moved for summary judgment on the basis that it "is not the plaintiff's 'employer' as such term is used under Title VII." Motion for Sum. J. at p. 1, ¶ 1. *See also* Defendant's Memo. of Law in Support of Motion for Sum. J., at p. 4. ("U-Haul International, Inc. Was Not Karen Romano's Employer.").

UHI specifically focused on the lack of any agency relationship between it and its subsidiary, *id.* at pp. 4-5, cited the cases on which its agency arguments were based on appeal, *id.* at p. 6, n. 1, and argued that under common law agency principles:

> There was no employment relationship between Romano and UHI. UHI cannot therefore be held liable under Title VII as Romano's employer.

Id. at 6. *See also id.* at 16.

The trial court denied UHI's motion for summary judgment, ruling it would apply the four-factor integrated enterprise test rather than common law agency principles. In its pre-trial motions, UHI continued to object to the application of the integrated enterprise test:

> UHI contends it was not Karen Romano's employer at the time of her termination and that it cannot be found liable under Title VII . . . . This issue has recently been made the subject of a summary judgment motion . . . .

See Defendant's Pre-Trial Memo. at p. 1, ¶ 1. *See also id.* at p. 3, ¶ 2. UHI again pressed the issue in its proposed jury instructions.[1/]

[1/] *See* Defendants' Proposed Instruction No. 7 ("plaintiff cannot establish....that U-Haul International, Inc. was her 'employer'"); No. 5 ("The defendant U-Haul International, Inc. specifically denies it is liable to the

(footnote continued to next page)

At the commencement of trial the District Court ruled on the various *in limine* motions and expressly ruled that it would apply the four-factor integrated enterprise test rather than a common law employment/agency standard:

> THE COURT: Yeah, the other large issue that remains is the status of the defendants. In other words, whether U-Haul International is a viable defendant here or whether they're not....I'm pretty well satisfied that I'm going to instruct consistent with *Mas Marques versus Digital Equipment*, the four factors that they talk about in that case, plus the issue of control.

Tr. at 31. The District Court was clear that an agency argument would not be entertained.

At the close of plaintiff's case, Petitioners moved for JMOL, *see* Tr. at 296, raising "the discrete issue of whether U-Haul International, Inc. should remain a defendant in this case." Tr. at 301. At the charge conference, counsel objected that "the instruction as it stands is not a correct statement of the law," Tr. at 516; *see also* Tr. at 522, to which the District Court responded, "I indicated to you preliminarily that I was

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plaintiff because it was not the plaintiff's employer."); No. 8 ("You may not find that an employee relationship existed between U-Haul International, Inc. and the plaintiff....").

going to use that case [*Mas Marques*] as a standard." Tr. at 517. The District Court then assured the parties that their objections could be renewed "in a much more summary matter" after the jury was instructed, Tr. at 526, at which time Petitioners renewed and incorporated by reference all the objections and arguments previously articulated, *see* Tr. at 592, again specifically objecting to the integrated enterprise instruction, *see* Tr. at 592-93, and renewed their JMOL motion based on the earlier arguments. Tr. at 527.

In their post-trial JMOL motion, Petitioners expressly raised the issue that UHI and U-Haul of Maine "were separate corporate entities" and that under the doctrine of limited liability the presumption is the parent is not the employer of its subsidiary's employees. Defendants' Memo. of Law in Support of Post-Trial Motions at pp. 4-5. Petitioners urged as a matter of law that the integrated enterprise question should not have been put to the jury at all, *id.* at 6, and that "judgment should enter as a matter of law that UHI was not the plaintiff's employer." *Id.* at 7.

B. The District Court Passed on The Issue.

Where the District Court squarely decided the substantive issue presented and ruled that the integrated enterprise test rather than common law agency principles would be applied in determining if UHI were Romano's employer, it passed on precisely the first issue raised by this Petition. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256-57 (1981); *United States v. Williams*, 504 U.S. 36, 41-45 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991).

In fact, the District Court below **thrice** ruled on UHI's agency argument and thrice rejected it: first, by

denying the summary judgment motion, second, by submitting the integrated enterprise question to the jury, and third, by incorporating the earlier denials in its final judgment:

> In their Motion for Judgment as a Matter of Law, *Defendants restate legal and factual arguments made in their Motion for Summary Judgment and at trial.* The Court rejects these arguments for the reasons previously stated on the record.

Oct. 28, 1999 Order and Memo. of Decision. (Emphasis added).

Moreover, this Court has stated that:

> Our traditional rule is that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."

Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995), *quoting Yee v. Escondido*, 503 U.S. 519, 534 (1992). Petitioners are not advancing new claims; they are merely elaborating arguments supporting their consistent claim under federal law that UHI cannot be held liable as a matter of law as Romano's employer. *See id.* at 378-79.

Finally, where both the District Court and the First Circuit explicitly passed on the *Kolstad* punitive damages issue, there can be no waiver on that point.

III. There Are Numerous Additional Reasons Why Waiver Does Not Apply.

1. The issue of whether a parent corporation can be considered the Title VII "employer"

of its subsidiary's employees is a question of subject matter jurisdiction, which is not waivable. *See* Petition for Certiorari at 25.[2/]

2. The specific "agency" argument was fairly embraced within the more general questions of the appropriate legal standard to apply to determine employment relationships in the parent/subsidiary context, the argument that UHI was not Romano's employer, and the arguments that the integrated enterprise test should not be applied at all.

3. Romano herself waived any right to assert waiver because she did not object to Petitioners' JMOL motion on the grounds of waiver but addressed it on the merits. *See, e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 284 (5th Cir. 1999); *Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir. 1997); *Whelan v. Abell*, 48 F.3d 1247, 1251 (D.C. Cir. 1995); *Moretto v. G&W Elec. Co.*, 20 F.3d 1214, 1220 (2d Cir. 1994).

4. Petitioners' challenge to the jury instruction was two-fold: first, the integrated enterprise issue should not have been submitted to the jury at all and, second, once it was, the formulation used by the District Court was erroneous. Rule 51

[2/] *See also U.S. Cath. Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988) ("The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics.").

lack of specificity waiver applies only to the second type of objection, and a failure to object to the jury charge on the first basis is not necessary where the movant has brought its legal position to the attention of the court. *E.g., Thompson and Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 432 (5th Cir. 1996); *Dawson v. New York Life Ins. Co.*, 135 F.3d 1158, 1165 (7th Cir. 1998); *Stewart v. Ford Motor Co.*, 553 F.2d 130, 140 (D.C. Cir. 1977).[3/]

5. Rule 50(b) is essentially a notice provision: were the appellant's objections stated with sufficient clarity to apprise the trial court of the movant's legal position. *See* Wright & Miller, Federal Practice and Procedure § 2533 at 580. As the discussion above illustrates, the one issue that has driven this case from the trial level to the Supreme Court is what legal standard should be used to determine when, if ever, a parent corporation can be considered the Title VII employer of its subsidiary's employees. Romano can scarce claim surprise that the agency argument was first sprung on her at appeal. Romano herself alleges in the Complaint that "UHCM acts as UHI's agent," *see* First Amended Complaint ¶ 8, and that "UHI is an employer within the meaning of Title VII . . . because (a) UHCM is UHI's agent . . . and/or (d) alter ego." *Id.* at ¶ 34.

[3/] Moreover, where the "trial court consistently ruled adversely to petitioners on this point," and assured counsel their subsequent objections could be made in summary fashion, there is no waiver. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 27 (1962).

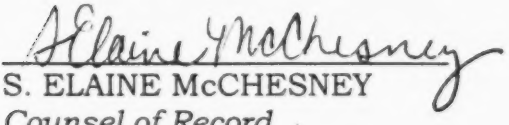
CONCLUSION

The integrated enterprise issue was pressed and passed on by the trial court, and there is no basis for this Court to deny certiorari on the basis of waiver. For the reasons previously stated, the petition for a writ of certiorari to the First Circuit should be granted.

Respectfully submitted,

U-HAUL INTERNATIONAL, INC. AND U-HAUL CO. OF MAINE, INC.,

By their attorneys,



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Dated: June 22, 2001